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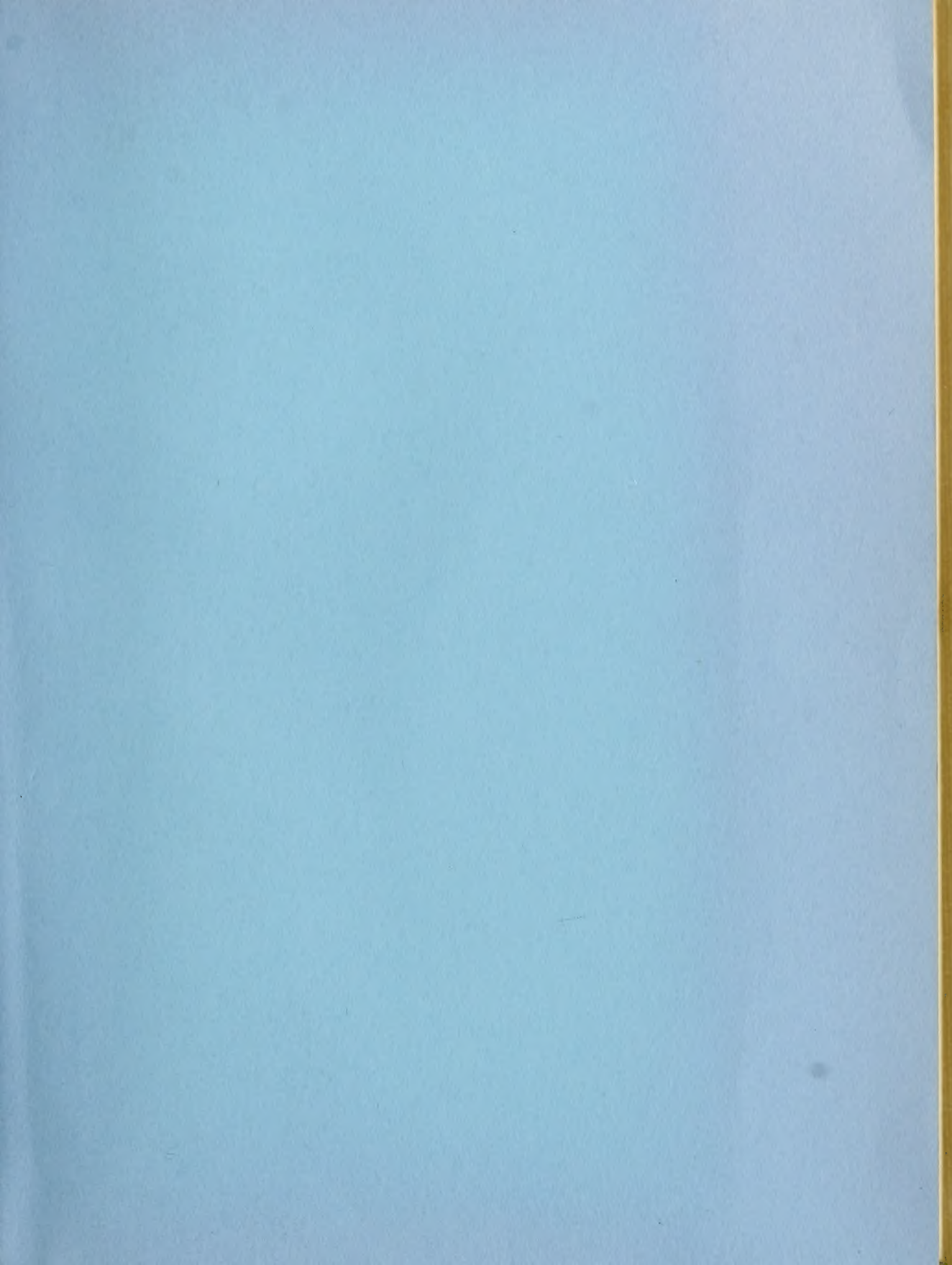
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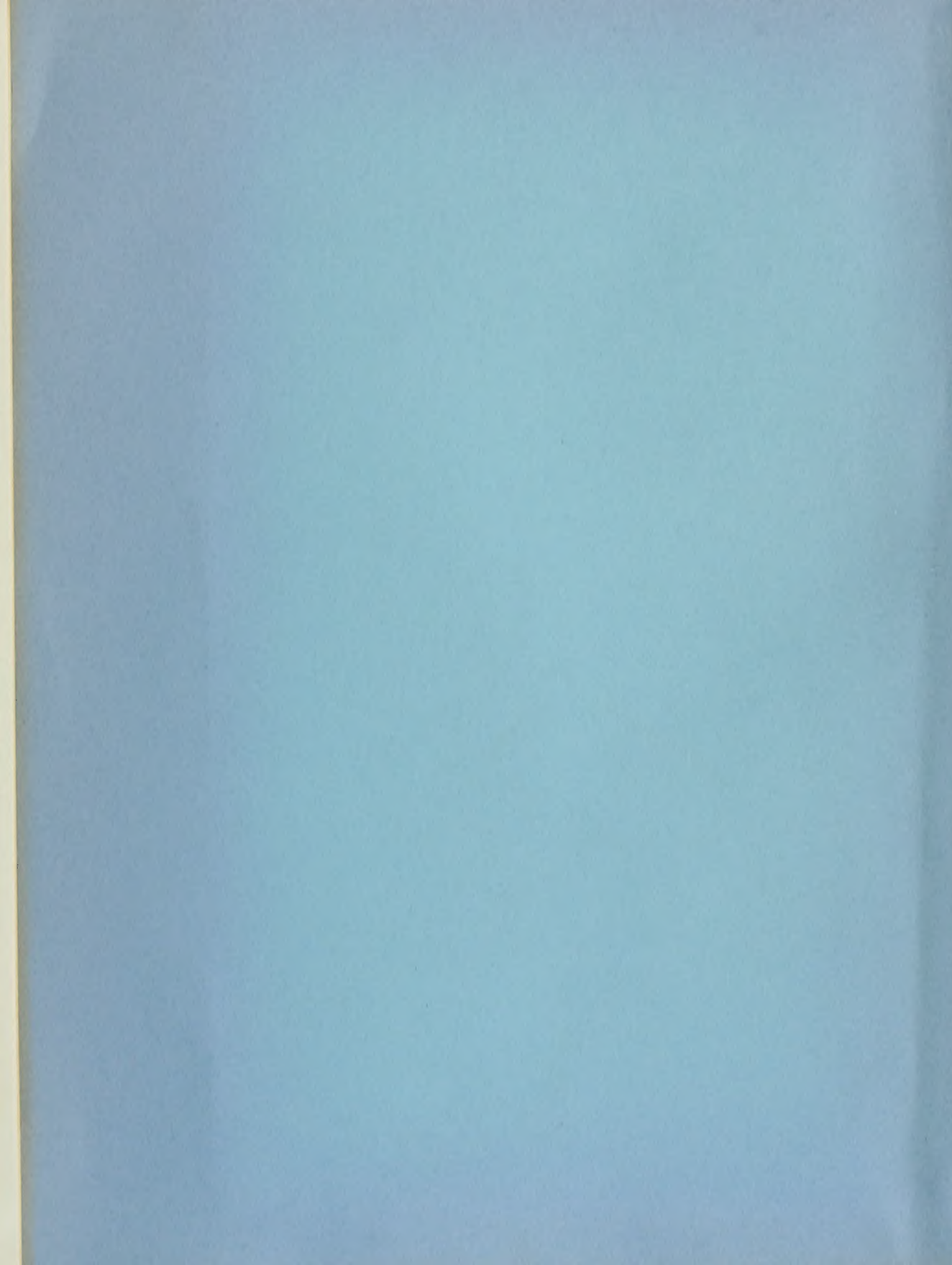
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No. 16,780 ✓

**United States Court of Appeals
For the Ninth Circuit**

HARRY P. LOCKLIN and ELMER J. BRANT,
general partners doing business under
the firm name of RADIANT COLOR COM-
PANY,

Appellants,

vs.

SWITZER BROTHERS, INC., a corporation,

Appellee.

*See also
Vols. 3181
3182*

**MOTION FOR LEAVE TO FILE
SECOND PETITION FOR REHEARING
and
SECOND PETITION FOR REHEARING**

CARL HOPPE,
2610 Russ Building,
San Francisco 4, California,
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and Petitioners.*

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MAR 11 1966

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No. 16,780

**United States Court of Appeals
For the Ninth Circuit**

HARRY P. LOCKLIN and ELMER J. BRANT,
general partners doing business under
the firm name of RADIANT COLOR COM-
PANY,

Appellants,

vs.

SWITZER BROTHERS, INC., a corporation,

Appellee.

**MOTION FOR LEAVE TO FILE
SECOND PETITION FOR REHEARING**

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

Harry P. Locklin and Elmer J. Brant, general partners doing business under the firm name of Radiant Color Company, appellants above-named, respectfully move this Court for leave to file the annexed Second Petition for Rehearing the judgment of this Court filed and entered on November 16, 1961 upon its opinion reported as *Locklin v. Switzer Brothers, Inc.* (9 Cir. 1961), 299 F. 2d 160. An earlier order of this Court filed December 26, 1961, denied a Petition for Rehearing filed December 15, 1961, raising the same issue as that which is raised in the annexed Second Petition for Rehearing.

Rehearing is sought anew because, as shown in the annexed Petition, the District Court has now entered certain findings of fact, establishing clear error of fact and latent ambiguity in the premises upon which this Court, in its opinion of November 16, 1961, concluded that Switzer's Kazenas patent No. 2,809,954 met the requirements of U. S. Code, Title 35, Section 112.

As shown in the annexed Petition, certain facts and circumstances which Switzer itself brought to the attention of the District Court in response to the mandate handed down upon this Court's decision in *Locklin v. Switzer Brothers, Inc.* (9 Cir. 1965), 348 F. 2d 244, are in direct and irreconcilable conflict with, and render ambiguous, the factual premises upon which this Court based its opinion of November 16, 1961.

The grounds upon which the second petition is based arose after the filing of the original Petition for Rehearing. The judgment of the District Court which this Court reviewed in making its judgment of November 16, 1961, has not yet become final. Proceedings to determine the extent of damages under said judgment are still in the discovery stage and such accounting proceedings have not yet been tried.

Since the judgment which this Court reviewed is thus still interlocutory, this Court has the clear power to entertain the second petition for rehearing under the authority of:

Simmons Co. v. Grier Bros. Co. (1922), 258 U. S. 82, particularly pages 90-91;

Marconi Wireless Co. v. U. S. (1943), 320 U. S. 1, particularly pages 47-48;

McCullough v. Kammerer Corporation (9 Cir. 1945), 148 F. 2d 525; and

Stoody Co. v. Carleton Metals (9 Cir. 1940), 111 F. 2d 920.

This petition is presented to this Court rather than to the District Court because the District Court has no power to entertain a motion such as this after this Court has reviewed the interlocutory judgment and has handed down its mandate. *Atlas Scraper and Engineering Co. v. Harry A. Pursche* (9 Cir. 1966), F. 2d, Appeal No. 19404.

Appellants further move the Court for an order granting them leave to file their second petition for rehearing exceeding five pages in length. As appears from the proposed second petition for rehearing which follows this motion and from the attached affidavit, the nature and the factual complexity of the issues has made it impossible to limit the proposed petition to five pages and yet adequately tender the issues to this Court.

Appellants respectfully request, should this motion be denied, that such denial should grant appellants the privilege to present an appropriate motion to the District Court for reconsideration or rehearing the question of whether the claims of Switzer's Kazenas patent do meet the requirements of U. S. Code, Title 35, Section 112 in the light of the District Court's present findings of fact and conclusions of law filed February 17, 1966.

CARL HOPPE,
*Attorney for Appellants
and Petitioners.*

State of California
City and County of San Francisco—ss.

Carl Hoppe, being first duly sworn, deposes and says:

1. Affiant is one of the attorneys of record for appellants and petitioners in the foregoing motion for leave to file second petition for rehearing.

2. Affiant prepared the foregoing motion as well as the proposed second petition for rehearing and knows the contents of each.

3. The matters set forth in the following paragraphs of this affidavit which matters are referred to in the motion and proposed petition are true of affiant's own knowledge.

4. The judgment of the District Court which this Court reviewed in making its judgment of November 16, 1961 has not yet become final.

5. Proceedings to determine the extent of damages under said judgment are still in the discovery stage and such accounting proceedings have not yet been tried.

6. The nature and the factual complexity of the issues has made it impossible for affiant to limit the proposed petition to five pages and yet adequately tender the issues to this Court.

7. Appendices A, B, C, D and E attached to the proposed second petition for rehearing are true and correct copies of the documents or papers which they purport to represent.

CARL HOPPE

Subscribed and sworn to before me this 11th day of March, 1966.

(Seal)

G. S. WEBSTER

Notary Public in and for the City and
County of San Francisco, State of
California. My commission expires
Oct. 31, 1969.

No. 16,780

United States Court of Appeals For the Ninth Circuit

HARRY P. LOCKLIN and ELMER J. BRANT,
general partners doing business under
the firm name of RADIANT COLOR COM-
PANY,

Appellants,

VS.

SWITZER BROTHERS, INC., a corporation,

Appellee.

SECOND PETITION FOR REHEARING

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

Most respectfully, Harry P. Locklin and Elmer J. Brant, general partners doing business under the firm name of Radiant Color Company, appellants above-named, petition this Court to grant a rehearing of the above-entitled cause with respect to its opinion handed down November 16, 1961, and reported at 299 F. 2d 160 on the grounds set forth in this Petition.

1. One of the important issues which appellants raised on the original appeal was that Switzer's Kazenas Patent No. 2,809,954 did not comply with that provision of U. S. Code, Title 35, Section 112 which provides:

"The specification shall conclude with one or more claims *particularly* pointing out and *distinctly* claiming the subject matter which the applicant regards as his invention." (Emphasis added.)

2. Appellants based their contention upon the premise that the language of the Kazenas claims that the amount of melamine is an amount "sufficient to render said condensation product substantially insoluble in aromatic hydrocarbon solvents" did not fulfill the mandate of the statute.

3. In overruling appellants' contention on that statutory defense, the District Court made the determinations set forth in its opinion of September 4, 1959, a copy of which is attached to this petition as Appendix A. On this specific defense, the District Court said among other things:

"... The expression of the maximum and minimum melamine content in functional terms limits the claims to the exact scope of the invention. Indeed, the functional expressions define the limits of the invention more precisely than would have been practically possible by wholly mathematical expressions."

4. In overruling appellants' contention on that statutory defense, this Court, in its opinion of November 16, 1961, made the determinations set forth in its opinion, a copy of which is attached to this petition as Appendix B. With specific reference to the functional limitation as defining invention over the prior art Japanese patent, this Court particularly noted that the District Court "carefully considered the Japanese patent and, apparently relying on the testimony of Dr. Hatcher with respect to his experiments on this patent", concluded that the Japa-

nese resin differed from the Kazenas resin "in at least one vital respect in that it is soluble in aromatic hydrocarbons, while the Kazenas resin is substantially insoluble."

In overruling the statutory defense, this Court recognized that "the novelty for which Switzer contends is that this resin is both thermoplastic and insoluble . . .", and relieved Switzer from the alternative "to state the critical lower limits precisely" because:

" . . . The critical point remains the same for each melamine compound used. It simply is not specified. But whether specified or unspecified the scope of the claim is precisely that of the invention."

* * * * *

" . . . There is testimony to the effect that 'sufficient melamine to render the resin substantially insoluble' is a simple, clear test for an ordinary chemist to perform and one which does not require extensive experimentation in order that the precise critical limits be ascertained in a particular case. . . ."

5. The testimony of Dr. Hatcher with respect to his experiments upon the Japanese patent and the Kazenas resin, as well as all portions of his testimony having any bearing upon the contested statutory issue, are abstracted from the original record on appeal and are reproduced as Appendix C attached to this petition. In summary, the testimony of Dr. Hatcher shows that:

A. His experiments for determining whether the resin was substantially insoluble in aromatic hydrocarbon solvents consisted solely of a single series of tests in which he ground the prior art resin and the Kazenas Example 5 resin and placed them in pure toluene in August 1958, and demonstrated the agglomeration of the prior art resin and the free flowing characteristics of the Kazenas Example 5 resin to the District Court in January 1959, an elapsed time of about four and one-half months.

B. The only language in the patent specification which even suggests that the Kazenas resin contained sufficient melamine to render the resin substantially insoluble in aromatic hydrocarbons is:

"... The new resin is insoluble in many common vehicles and can therefore be suspended in such vehicles without coalescence or agglomeration."

* * * * *

"The pigments prepared in the manner described in the foregoing examples are insoluble in water and aliphatic hydrocarbon solvents, are practically insoluble in aromatic hydrocarbon solvents, and are soluble in ketones and solvent esters..."

* * * * *

"Based on these physical characteristics, the pigments may be used in vehicles which are non-solvents for the pigments to form various types of inks and the like..."

6. After this Court denied the earlier Petition for Rehearing, and after the Supreme Court denied a petition for the writ of certiorari and denied rehearing, appellants adopted one form of substitute resin for the adjudicated resin. While the accounting proceedings were still pending, Switzer brought proceedings to have appellants declared in contempt of court because of their manufacture and sale of that substitute resin. Such proceedings resulted in a contempt judgment which this Court set aside in *Locklin v. Switzer Brothers, Inc.* (9 Cir. 1965), 348 F. 2d 244. The opinion of the Court is attached to this petition as Appendix D. In its opinion, this Court remanded the matter

"... with instructions that the order of the District Court be set aside and that trial be had upon the sole question whether, in the 4-C resin, the amount of melamine utilized is such as to bring the resin within the limits of the claims of the Kazenas patent as those claims are delineated in our former opinion."

7. After this Court handed down its mandate on said last appeal, and after trial on the merits, the District Court entered findings of fact and conclusions of law incorporated in a written memorandum decision filed February 17, 1966 and reproduced as Appendix E attached to this Petition.

8. On its face, the facts found by the District Court on February 17, 1966, demonstrate that the premises upon which the District Court based its decision of September 4, 1959 and upon which this Court based its opinion of November 17, 1961, were contrary to fact in some respects and latently indefinite in other respects, all as are set forth below:

A. This Court in its opinion relied upon the premise that once the resin is finely ground, it must remain insoluble in aromatic hydrocarbon solvents and in a state of free flowing suspension. This premise underlies the following determination of this Court:

“... The resin must be capable of being finely ground. Once ground, it must remain insoluble in common paint vehicles or solvents and in a state of free flowing suspension.”

* * * * *

“The Kazenas patent is for a resin which is a condensation of all three of these chemical components and which is thermoplastic but still is capable of being finely ground and which remains insoluble without agglomeration in aromatic hydrocarbon solvents.”

* * * * *

“... If the fact was that the resin would agglomerate and would not remain free flowing, Radiant could have established this by its own pre-trial experiments and have introduced evidence with respect to those experiments at the proper time. . . .”

aromatic hydrocarbon solvent as a constituent. With respect to this, the District Court now finds:

“Further, the testing of a resin in any pure aromatic hydrocarbon solvent is merely an indication of the substantial insolubility of the resin in a paint vehicle.

“The mere fact that resin agglomerates within four or more weeks in a pure hydrocarbon solvent, such as benzene, does not necessarily indicate that the resin will agglomerate in a paint vehicle in the same period of time. Pure hydrocarbon solvents are never used alone with resin in a paint vehicle, but only in conjunction with other liquids and substances which in effect reduce the strength of the pure solvent.

“Thus, in a paint vehicle the resin will actually remain insoluble for a considerably longer period of time than in a pure solvent.

“As demonstrated at trial by Switzer, resins made up in accordance with the examples in the Kazenas patent have remained free-flowing and dispersable in the paint vehicles for longer than five years (RT 109-113).”

9. These facts clearly demonstrate that the claims of the patent fail to particularly point out and distinctly claim the invention in the following respects:

(a) The claims do not state whether the test for “substantially insoluble” should be qualitative or quantitative and the District Court after a full hearing was unable to make a definitive determination as to “the minimum standard for determining the question presented.”

(b) With respect to a qualitative definition, the claims do not state how long the resin must remain “substantially insoluble.” The District Court felt compelled to accept a lapse of time between the date when the powdered resin was placed in toluene and

the date when the observations of the condition of the resin in the toluene were made of less than one week, whereas for purposes of validity, the District Court in the first instance relied upon a period of several months.

(c) With respect to qualitative tests, the claims do not state whether "substantially insoluble" is a matter of substance or a matter of mere form. The District Court in the last instance found that all resins of this type will eventually agglomerate in any pure aromatic hydrocarbon solvent, whereas this Court in its original opinion found that the resins had to remain free flowing in aromatic hydrocarbon solvents.

(d) With regard to quantitative tests, the claims do not state any definite quantity of solubility which would be "substantially insoluble." The District Court did not adopt any definite or distinct quantity as defining the difference between the prior art Japanese resin and the patented resins with respect to substantial insolubility and Dr. Hatcher did not testify in this area at all on the original trial.

(e) It now appears that the words "aromatic hydrocarbon" are not definite. The District Court found it necessary on the contempt proceedings to vary the ordinary meaning of the words "aromatic hydrocarbon solvents" by giving benzene different treatment than other aromatic hydrocarbon solvents—although benzene has been recognized as being the parent of all aromatic hydrocarbon solvents.

(f) It now appears that the word "solvents" is indefinite. In construing the term "aromatic hydrocarbon solvents" in the claims, the District Court found it necessary to distinguish solvents from common paint vehicles.

10. The facts thus newly found and the deviations from the original opinions now found essential to construe the claims establish, appellants submit, that the claims do not particularly and distinctly claim the invention and warrant a reversal of the original findings and determinations that such claims do comply with the statute. This conclusion is supported by the following cases:

United Carbon Co. v. Binney Co. (1942), 317 U. S. 228;

Standard Brands v. Yeast Corp. (1939), 308 U.S. 34, at page 38;

Barkeij v. Lockheed Aircraft Corp. (9 Cir. 1954), 210 F. 2d 1, cert. den. (1954), 348 U. S. 847, reh. den. (1954), 348 U. S. 884;

Vitamin Technologists v. Wisconsin Alumni Research F. (9 Cir. 1944, as amended 1945), 146 F. 2d 941, cert. den. (1945), 325 U. S. 876, reh. den. (1945), 326 U. S. 804;

Jones Knitting Corp. v. Morgan (E.D.Pa. 1964), 244 F. Supp. 219, at pages 222-224;

McCulloch Motors Corporation v. Oregon Saw Chain Corp. (S.D.Cal.C.D. 1964), 234 F. Supp. 256, at pages 258-259;

Marshall v. Procter & Gamble Manufacturing Company (D.Md. 1962), 210 F. Supp. 619, at pages 630-631; and

Armco Steel Corp. v. United States Steel Corp. (W.D.Pa. 1962), 203 F. Supp. 654, at pages 656-657.

Although the *United Carbon*, *Barkeij* and *Vitamin Technologists* cases were cited in Appellants' Opening Brief, in No. 16,780, pages 90-95, Switzer made no effort to distinguish any of them in its Brief for Defendant-Appellee and this Court, quite understandably, in view of Switzer's contentions then made, did not in its opinion

foresee the latent ambiguities inherent in the Kazenas claims making such cases applicable. *Standard Brands* is newly cited authority urged as being pertinent to indefiniteness now exposed by the experimentation which is necessary to define the invention as now presented by Switzer. The remaining cases all came down after this Court's decision of November 16, 1961.

The facts now found on the contempt matter and made in the light of Switzer's present contentions, certify that the latent ambiguities create a real uncertainty of claim language in violation of the statute. The mere fact that the claim language is susceptible of the shifting and variable interpretations now manifest in the several opinions proves that the claims are not definite.

11. This petition for rehearing is based solely upon the face of the opinion below and does not attack the opinion on the merits. On the merits, the decision below will be made the subject matter of an independent appeal.

For the foregoing reasons, petitioners respectfully pray that this, their second petition for rehearing, be granted and that this Court grant reargument on the question of whether the claims conform with 35 U.S.C. 112 in the light of the findings which the District Court has just made. In the alternative and if this second petition for rehearing be denied, petitioners pray that the denial grant them the privilege to file a motion for reconsideration of this issue in the District Court so that the matter of statutory compliance may there be redetermined in the light of the facts brought out in the most recent opinion of the District Court.

Respectfully submitted,

CARL HOPPE,

*Attorney for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL

I, Carl Hoppe, attorney for Appellants, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for purpose of delay.

CARL HOPPE.

(Appendices Follow)

Appendices.

leged infringement of the patent by Plaintiffs and prayed for an injunction and damages.

The patent in suit, issued on October 15, 1957 to Zenon Kazenas and assigned to Defendant, is for a thermoplastic melamine-sulfonamide-formaldehyde resin and the process for making such resin. The Kazenas resin has a combination of properties that make it particularly useful for the manufacture of pigments. It is friable and readily grindable into a finely divided condition. It does not agglomerate during grinding inasmuch as it does not exhibit cold flow at room temperatures, [1] and does not soften below 100° C. It is insoluble in common paint solvents such as aliphatic and aromatic hydrocarbons, and hence, can be suspended in such vehicles without coalescence or agglomeration. Yet it is soluble in ketones in which it can be dissolved to form coating compositions. When employed with certain fluorescent dyes in a pigment, the resin imparts superior light-fastness to the pigment.

The ingredients employed by Kazenas to make his resin had previously been in common use in the manufacture of resins, but they had not theretofore been combined in the manner disclosed in the Kazenas patent. Melamine had commonly been reacted with formaldehyde to make melamine aldehyde resins while sulfonamide had commonly been separately reacted with formaldehyde to make sulfonamide-aldehyde resins. The melamine-aldehyde resins are thermoset resins, that is, once having been set by heat, they are infusible upon further heating. The sulfonamide-aldehyde resins are thermoplastic, that is, capable of being fused or softened by heat. The thermoset melamine-aldehyde resins are so hard and tough that they are difficult to grind and are insoluble in aromatic and aliphatic hydrocarbons and in ketones. The thermoplastic sulfonamide-aldehyde resins have such a low melting point that they tend to agglomerate upon grinding and they are

soluble in aromatic and aliphatic hydrocarbons and in ketones.

Prior to the disclosures of the Kazenas patent, it was understood by those skilled in the art of making resins, that melamine, sulfonamide, and formaldehyde were compatible in combination and that melamine-aldehyde resins could be modified by adding sulfonamide while sulfonamide-aldehyde resins could be modified by adding melamine. But, the literature introduced to show the state of the prior art, contains very meager teachings regarding particular combinations of melamine, [2] sulfonamide, and formaldehyde that would produce specific results.

Plaintiffs concede that the Kazenas patent is not anticipated by any resin in the prior art, but it is contended that the Kazenas resin is not such an advance over the prior art as to constitute invention.

Of the prior art references cited by Plaintiffs, two relate to the modification of melamine-aldehyde resins by the addition of sulfonamide. One is the Widmer and Fisch Patent No. 2,197,357 for aminotriazine-aldehyde condensation products in which melamine is one of the preferred aminotriazines employed. The specification states that it is not necessary to use aminotriazine alone in the condensation, and that other compounds capable of forming resins with aldehydes, such as sulfonamides, may be added. The specification goes on to list a variety of properties which may be exhibited by the condensation products depending upon the parent material selected and the conditions of the reaction. But, nowhere is there any intimation regarding the result that might be anticipated if sulfonamide were introduced in the condensation of melamine and formaldehyde. It is obvious that the Widmer-Fisch patent is of little consequence in appraising the Kazenas resin as an invention.

The other reference relating to the modification of melamine-aldehyde resins by sulfonamides is an article by Bergen and Craver in the September, 1947 issue of Industrial and Engineering Chemistry entitled "Sulfonamide Plasticizers and Resins". This article discusses generally the preparation, properties, and applications of sulfonamide plasticizers and resins. At one point, it comments that "Although the limits of compatibility are not shown here, it is known that the sulfonamides are compatible with, and in some cases actually [3] enter into, the reaction of various thermosetting plastics such as urea-formaldehyde, melamine formaldehyde, and phenol-formaldehyde. Here they impart an increased flow or plasticity, which makes possible laminated punching stock or postformed articles, and decreased molding pressures and temperatures." Further on it states that "The sulfonamides are used by the plastics industry for plasticizing thermosetting resins, such as phenol-formaldehyde, urea-formaldehyde, melamine-formaldehyde, and copolymer-ester-type resins, so that better flow is obtainable and lower temperatures and pressures may be used." The entire import of this disclosure is that a thermosetting melamine-formaldehyde resin, when modified with sulfonamide, will flow at lower temperatures and pressures prior to becoming set, but will retain its character as a thermosetting resin. This disclosure certainly would not suggest the condensation of melamine, sulfonamide, and formaldehyde to obtain a thermoplastic resin such as the Kazenas resin.

The remainder of the prior art references relate to the modification of sulfonamide-aldehyde resins by the addition of melamine. Two of these references, the Bren Patent No. 1,961,579 and the Moss and White Patent No. 1,873,848 on their face, do not deal with the modification of sulfonamide-aldehyde resins with melamine. They de-

scribe modification by addition of urea, thiourea or guanidine. It is plaintiffs' contention that melamine is a chemical so closely analogous to urea, thiourea or guanidine that it could not constitute invention to substitute melamine for any one of the three. In support of this contention, plaintiffs cite a paragraph from Chemical Abstracts for January 20, 1946 which merely notes that a British patent discloses that when certain specified chemicals are heated together with one or more of such substances as urea, thioureas, guanidine, and aminotriazines, [4] decorative or protective film-forming compositions are obtained. Plaintiffs also cite several published judicial opinions. Only two of these opinions are relevant at all, and they lend slim support to Plaintiffs' argument that it would be routine to substitute melamine for urea, thiourea, or guanidine. In *re Berger*, 143 F.2d 971, indicates that melamine-aldehyde resins and urea-aldehyde resins are analogous, but do not function in the same way in all circumstances. In *re West*, 160 F.2d 570, merely suggests that urea, thiourea, and aminotriazines have sufficient common properties to warrant their being characterized as a class in a particular application. It is readily apparent that Plaintiffs' references fall far short of teachings that melamine is so similar to urea, thiourea, or guanidine that one could substitute it for any one of the three in the making of resins and expect to obtain the same result.

But, even assuming that melamine were regarded in the art as the equivalent of urea, thiourea, and guanidine, the Bren patent and the Moss-White patent describing the modification of sulfonamide-aldehyde resins by addition of these substances would not suggest that the addition of melamine to a sulfonamide-aldehyde resin would produce a resin with the properties of the Kazenas resin. The Bren patent merely discloses that the formation of bubbles

in products molded from a sulfonamide-aldehyde resin can be prevented by adding sufficient urea, thiourea, or guanidine to react with any aldehyde released in gaseous state when the resin is heated.

The Moss-White patent relates primarily to the preparation of a toluene sulfonamide-aldehyde resin compatible with derivatives of cellulose. A modification of this resin with urea is described as follows: [5]

“In another mode of carrying out our invention 5 to 10% of urea as [sic] added to the initial reactants, and the subsequent steps are carried out as already described. We have further found that this resin is not permanently fusible in the way in which this term is commonly used in resin literature. If the improved resin, as herein described, is held at a temperature of 160-200° C., preferably about 175° C, for from 4 to 8 hours, it is converted into a dark, greenish brown resin, which consists almost entirely of two crystalline substances, both of which are largely insoluble in benzene. The exact composition and formula of these substances cannot be given. However, one of them, in the crude state in which it separates from the benzene solution, melts at 140-150° C, whilst the second one melts at 160-162° C., and on recrystallizing from alcohol or xylene it melts sharply at 165° C.”

Plaintiffs contend that this description discloses that the modification of a sulfonamide-aldehyde resin with urea will produce a thermoplastic resin substantially insoluble in aromatic hydrocarbon solvents with a high melting point, similar to the Kazenas resin. But, the Moss-White disclosure is obscure in several respects. It is not at all clear that the statement that the resin “is not permanently fusible” means that it is thermoplastic, for this statement could be taken to mean that the resin is not permanently capable of being melted and is therefore thermosetting. The explanation that the resin consists of

two compounds both largely insoluble in benzene, which separate independently from a benzene solution and individually recrystallize from xylene does not indicate that the described resin is a homogeneous resin, itself, substantially insoluble in aromatic hydrocarbons. Moreover, the described resin differs significantly from the clear Kazenas resin, in that it is a dark, greenish brown. It is not at all reasonable to assume that the Moss-White disclosure would point the way to the Kazenas resin even if melamine were taken to be the equivalent of urea.

The only prior art reference specifically describing the modification of a sulfonamide-aldehyde resin with melamine is the Japanese Patent No. 181,405 for a method of producing a [6] highly waterproof para-toluol-sulfamide resin of a high melting point.

The Japanese patent discloses that the reaction of para-toluol-sulfamide and formalin with a small amount of melamine will produce a resin which has greater waterproofness and a substantially higher melting point than a conventional para-toluol-sulfamide resin, but which retains the other characteristics of such a resin. The Japanese resin, as described in the patent, thus has properties similar to those of the Kazenas resin in that it is thermoplastic and has a relatively high melting point,¹ but it differs in at least one vital respect in that it is soluble in aromatic hydrocarbons, while the Kazenas resin is substantially insoluble. Both the Japanese resin and the Kazenas resin are composed of a sulfonamide, an alde-

¹A softening point of 122° C was claimed for the Japanese resin. Yet, Plaintiffs' expert and Defendant's expert testified that upon testing a sample of the Japanese resin prepared by them, they respectively found that it softened at 81° and 89° C. Consequently, if the patentable novelty of the Kazenas resin were dependent upon its melting point, the Court could not accept the Japanese patent as prior art in fact disclosing a method of modifying a sulfonamide-aldehyde resin with melamine to obtain a resin with a high melting point.

hyde, and melamine, but in critically different proportions. The most significant difference is in the amount of melamine. The Japanese patent specifies a "small" amount of melamine which, in the single example set forth in the patent, is 5% by weight of the para-toluol-sulfamide employed. The Kazenas patent teaches the use of a substantial amount of melamine or melamine derivative ranging in amount from 11 to 50% by weight of the sulfonamide. Kazenas also teaches the use of a greater amount of aldehyde in relation to the sulfonamide.

Plaintiffs urge that it did not constitute invention for Kazenas to vary the proportion of melamine and aldehyde to achieve substantial insolubility in aromatic hydrocarbons. But, the Japanese [7] patent, itself, does not even suggest the possibility that a greater proportion of melamine and aldehyde might produce a resin substantially insoluble in aromatic hydrocarbons. Indeed, it would discourage experimentation along these lines. Since the patent states that, except for greater waterproofness and a higher melting point, the Japanese resin does not lose the characteristics of a conventional para-toluol-sulfamide resin, one could only conclude that the modification with melamine does not affect its solubility in aromatic hydrocarbons.

It is possible that the mere fact that melamine-aldehyde resins were known to be insoluble in aromatic hydrocarbons might suggest to a skilled chemist that the modification of a sulfonamide-aldehyde resin with melamine might make the resin less soluble in aromatic hydrocarbons. But, it could not have been anticipated that sufficient melamine could be used to achieve substantial insolubility in aromatic hydrocarbons without simultaneously making the resin thermosetting. Nor, was there any basis for expecting that the reaction of melamine with sulfonamide and an aldehyde would produce a resin having the insolubility in aromatic hydrocarbons characteristic of a melamine-

aldehyde resin, but retaining the ketone solubility characteristic of a sulfonamide-aldehyde resin.

The sum and substance of the teachings of the prior art, including the Japanese patent, was that the properties of melamine-aldehyde resin could be modified to some extent by adding a small amount of a sulfonamide, and that the properties of a sulfonamide-aldehyde resin could be modified by adding a small amount of melamine. These teachings were narrow ones. They did not constitute such important and substantial discoveries that the ordinary capable chemist could carry on from that point and in normal course produce the Kazenas resin.² [8] The Kazenas patent discloses the new and broader concept that melamine and a sulfonamide, each in a relatively substantial quantity, could be reacted together with an aldehyde to produce a distinct resin having some of the properties of a sulfonamide-aldehyde resin, and some of the properties of a melamine-aldehyde resin, and other properties which are unique. The Kazenas resin represented a new arrangement of ingredients that produced a new, unexpected and useful result. The Court is satisfied that it was such an advance over the prior art as to constitute invention.

Apart from their contention that the Kazenas resin did not amount to an invention, Plaintiffs contest the validity of the Kazenas patent on the basis of several claimed defects in the patent itself.

Plaintiffs first urge that because the essence of the Kazenas invention is the relative proportions of the components of his resin, the patent lacks validity in failing to disclose or claim any critical limits. But, Plaintiffs' view could only be sustained by a hypercritical and piecemeal analysis of the patent. The Court is satisfied both

²Aluminum Co. of America v. Thompson Products, 122 F. 2d 796 (6 Cir. 1941); Rohm & Haas Company v. Roberts Chemicals, 245 F. 2d 693 (4 Cir. 1957).

from its own reading of the patent and the expert testimony, that anyone with a modicum of skill in the resin art upon examining the Kazenas patent in its entirety would clearly understand that the relative proportions of melamine, sulfonamide, and aldehyde must be maintained within a limited range in order to produce a resin that would be thermoplastic, have a high melting point, and be substantially insoluble in aromatic hydrocarbons. The Court is further satisfied that the critical range is set forth with sufficient precision that anyone skilled in the art could readily perceive its limits.

Plaintiffs' expert testimony to the effect that the upper and lower limits specified in the patent are not in fact [9] critical was not convincing. Upon cross-examination the testimony of Plaintiffs' expert tended to confirm the teaching of the patent that the melamine component should not exceed 50% by weight of the sulfonamide. The experiments performed by Plaintiffs' expert to test the properties of resin samples prepared in accordance with the examples in the Kazenas patent, in the opinion of the Court, are not reliable evidence to support Plaintiffs' contention that as one approaches the lower limit of the critical range within which the melamine content may be varied the proportion of melamine is inadequate to produce the aromatic hydrocarbon insolubility claimed by the patent. These experiments were limited in number. Some of the examples were admittedly not carried out strictly in accordance with the instructions. Some of the experiments which were repeated had inconsistent results that were not satisfactorily accounted for. There is an unexplained inconsistency in the testimony that the sample of example 3 was insoluble in toluene while the sample of example 4 was not although both examples call for an almost identical proportion of the melamine component.

Several asserted defects in the claims are contended by Plaintiffs to invalidate the Kazenas patent. It is urged

that the claims are void because the maximum and minimum limits of the melamine compound are expressed partially in functional terms. The language complained of is that which states that the melamine compound should be "sufficient to render said condensation product substantially insoluble in aromatic hydrocarbon solvents but insufficient to render it thermosetting." Plaintiffs cite a multitude of cases in support of the argument that this functional expression invalidates the claims. But, none of these cases holds that claims employing functional expressions to define the claimed invention are per se invalid. In all of the cases relied upon by Plaintiffs the claims were [10] disapproved because under the particular circumstances the use of functional expressions either left the description of the invention too vague or made the claim broader than the invention. The functional expressions employed in the Kazenas claims do not have either of these objectionable results. When the general description, the specific examples, and the claims are read together, the invention is so plainly defined that no one skilled in the art should have any difficulty in practicing it. The expression of the maximum and minimum melamine content in functional terms limits the claims to the exact scope of the invention. Indeed, the functional expressions define the limits of the invention more precisely than would have been practically possible by wholly mathematical expressions.

Plaintiffs also urge that the inclusion in the claims of the expression that the amount of melamine compound is "sufficient to render said condensation product substantially insoluble in aromatic hydrocarbon solvents" invalidates the claims because the minimum melamine proportion is not described in the specification. This is simply a restatement of the argument that it was improper to claim the minimum melamine content in functional terms. For, as has been noted, it would be

objectionable to claim an element of an invention in functional terms if the result was that such element was inadequately described in the specification. But, it would be readily apparent to anyone skilled in the art from the description of the invention that a sufficient quantity of melamine would be just as essential to achieve aromatic hydrocarbon insolubility as it would be to obtain the high melting point which is specifically stated to be dependent upon adequate melamine. The specification affords an adequate guide as to what this minimum quantity should be. The general description and the specific examples teach that the melamine component content may [11] be varied from 11 to 50 per cent by weight of the sulfonamide component depending upon the particular form of melamine component employed. It is stated that the preferred amount of unmodified B-state melamine-aldehyde resin, the form of melamine component to be used most sparingly, is one-fifth or 20% by weight of the sulfonamide component. The tenor of the description as a whole is that a fairly substantial amount of melamine component should be used. In this context, examples two and five, in which the specified amount of melamine is respectively 11% and 13% by weight of the sulfonamide component, constitute an adequate guide as to the minimum amount of melamine that will be effective to render the resin substantially insoluble in aromatic hydrocarbons.

Plaintiffs further contend that the language that the amount of melamine compound is "sufficient to render said condensation product substantially insoluble in aromatic hydrocarbon solvents" invalidates the claims because it was added by amendment to the patent application without being supported by a supplementary oath and after intervening rights had accrued. There is no merit to this argument because the language complained of did not constitute new matter. The general description and the specific examples were included in the original appli-

cation in substantially the same form as they appear in the patent. As has been previously stated, anyone skilled in the art could readily perceive from the general description and the examples that there would be a minimum amount of melamine necessary to render the resin substantially insoluble in aromatic hydrocarbons, even though the description does not say so in so many words. And, the description and examples sufficiently demonstrate what the minimum amount is.

Plaintiffs attack the validity of a number of the [12] Kazenas claims which claim a large class of melamine components and a large class of sulfonamide components on the ground that defendant has not shown that all of the members of each class are operable. But Plaintiffs have cited no authority and the Court is aware of none that places such a burden on the defender of a patent. In all of the cases cited by Plaintiffs some members of the class of compounds embraced by claims held to be invalid were in fact shown to be inoperative. Plaintiffs introduced no evidence showing that any members of the classes of compounds within the scope of the Kazenas claims are inoperative nor even any evidence that would suggest that some might be inoperative. Merely because the classes of components claimed are large ones is no basis for assuming that some of their members are inoperative.

The Court concludes that there is no invalidity in the Kazenas patent.³ In respect to the issue of infringement, the record clearly sustains the contention of Defendant that Plaintiffs have infringed claims 1-4 and claim 9 of the Kazenas patent. [13]

³Since the Court has concluded that the Kazenas resin is not dependent for patentable novelty upon the fact that it is completely condensed, it is unnecessary to discuss Plaintiffs' argument that patentable novelty may not be predicated upon that feature of the Kazenas resin.

Appendix B

**Opinion of the Court of Appeals for the Ninth Circuit
filed November 16, 1961, as reported in 299 F.2d 160.**

**Harry P. LOCKLIN and Elmer J. Brant, General partners doing business
under the firm name of Radiant Color Company, Appellants,**

v.

SWITZER BROTHERS, INC., a corporation, Appellee.

No. 16780.

**United States Court of Appeals
Ninth Circuit.**

Nov. 16, 1961.

Rehearing Denied Dec. 26, 1961.

Certiorari Denied April 23, 1962.

See 82 S.Ct. 950.

Action for determination that Patent No. 2,809,954 for resin useful in manufacture of pigments and for process of obtaining that resin was invalid and not infringed, wherein patentee counterclaimed charging infringement. The United States District Court for the Northern District of California, Southern Division, Louis E. Goodman, Chief Judge, ruled that patent was valid and infringed and appeal was taken. The Court of Appeals, Merrill, Circuit Judge, held that fact that some preliminary testing was required to determine proper portion of substance to be used to produce resin did not render claim invalid, where it appeared that amount needed could be determined by simple clear test not requiring extensive experimentation, and that patent was valid and infringed.

Affirmed.

1. Patents (Key) 20

Test in determining whether varying of proportions can constitute invention is whether it brings about mere

improvement in already discovered result, or accomplishes new and unexpected result.

2. Patents (Key) 118.3

Claim must be sufficiently clear to allow others to reproduce result at end of monopoly period and to enable contemporary inventors to ascertain whether or not they are infringing.

3. Patents (Key) 118.8

That some preliminary testing was required to determine proper portion of substance to be used to produce patented resin did not render claim invalid, where it appeared that amount needed could be determined by simple clear test not requiring extensive experimentation.

4. Patents (Key) 118.6

That limits of substance to be used in patented chemical product were, in claims, stated in functional language did not render patent invalid.

5. Patents (Key) 314

Whether steps followed by chemist, who reproduced patented product, were of type requiring expert as distinguished from ordinary industrial chemist was for trial court.

6. Patents (Key) 109

Where feature of insolubility of resin useful in manufacture of pigments was disclosed in specification of original application, although its bearing upon critical limit of amount of melamine to be used was not expressed, and amendment stated limitation implicit in specifications, but not explicit in claims themselves, no intervening public rights attached to insolubility feature of patent and no supplemental oath was required. 35 U.S.C.A. § 112.

7. Patents (Key) 118.17

Defender of patent for resin useful in manufacture of pigments was not required to establish effectiveness of each member of broad class of melamine derivatives that would be effective to produce alleged novel result.

8. Patents (Key) 328

Patent No. 2,809,954 for resin useful in manufacture of pigments and for process of obtaining that resin was valid and infringed.

9. Federal Civil Procedure (Key) 2016

Rejection of new matters of evidence sought to be introduced in post-trial proceedings was discretionary.

10. Federal Civil Procedure (Key) 2016

Time for testing of proof is time for trial and rights of litigants cannot be held in abeyance in order that hindsight may provide more accurate appraisal of evidence.

11. Patents (Key) 315

Denial of new trial, sought by party found to be patent infringer, upon ground of unclean hands, and refusal to delay judgment in order that hearing might be had on newly tendered issues was discretionary.

Carl Hoppe and James F. Mitchell, San Francisco, Cal., for appellants.

Flehr & Swain by John F. Swain, San Francisco, Cal., for appellee, Hill, Sherman, Meroni, Gross & Simpson, by Benjamin H. Sherman and Richard M. S. Manahan, Chicago, Ill., of counsel.

Before BARNES, JERTBERG and MERRILL, Circuit Judges.

MERRILL, Circuit Judge.

Appellants, doing business in California as Radiant Color Company, are manufacturers of fluorescent paints. They have taken this appeal from a judgment determining that they have infringed a patent held by appellee. The parties hereafter shall be referred to as "Radiant" (appellants) and "Switzer" (appellee).

Suit was originally brought by Radiant. It had been notified by Switzer that certain of its pigments infringed Switzer's resin patent number 2,808,954. This action was brought seeking declaratory relief: a determination that the patent in question was invalid and was not infringed. Switzer counterclaimed, charging Radiant with infringement and asking injunctive relief. The district court ruled that the patent was valid and infringed and granted Switzer relief in accordance with these determinations.

The patent in question was issued October 15, 1957, to Zenon Kazenas and subsequently was assigned to Switzer. It is for a resin useful in the manufacture of pigments and for the process of obtaining that resin. A preliminary consideration of the characteristics and chemical components of such resins is essential to any discussion of the issues presented by this appeal.

Such resins are classified industrially as "thermosetting" and "thermoplastic." A thermosetting resin is one which, upon heating in a mold, hardens to form an infusible "thermoset" resin that no longer can be softened or fused by heating. A thermoplastic resin, in contrast, can be softened or fused by heat repeatedly.

For resins satisfactorily to be incorporated into pigments, certain characteristics are important. The resin must be capable of being finely ground. Once ground, it

must remain insoluble in common paint vehicles or solvents and in a state of free flowing suspension.

Thermo setting resins, being tough and hornlike, are generally difficult to grind. Thermoplastic resins generally are also difficult to grind due to their tendency to ball up or "agglomerate" at the temperatures encountered during grinding. Furthermore, they generally do not remain in a free flowing state of suspension in common paint vehicles, but again tend to agglomerate.

We are here concerned with three chemical components: melamines, sulfonamides and aldehydes. These components and their characteristics were discussed in some detail by Dr. David B. Hatcher, an expert witness called by Switzer.

Melamine and sulfonamide are basic resin ingredients. Aldehyde was described as "the linker, you might call it the glue, between the larger molecules" of melamine or sulfonamide. Where melamine alone is reacted with an aldehyde, the result is a "self-condensed" resin, the molecules of melamine condensing with each other through reaction with the aldehyde. Similarly, a sulfonamide-aldehyde resin is a self-condensation. "Co-condensation" occurs where two unlike molecules are reacted together.

Dr. Hatcher testified, "Normally, melamine is resistant to co-condensation. It has a tendency to condense with itself so that most efforts to co-condense it are unsuccessful. What results is not a single resin resulting from co-condensation * * * but a mixture of self-condensed resins." Further, melamine resins are normally thermoset with considerable strength and resistance to crumbling and breaking.

Sulfonamide resins, on the other hand, are normally thermoplastic and soluble in aromatic solvents.

The Kazenas patent is for a resin which is a co-condensation of all three of these chemical components and which

is thermoplastic but still is capable of being finely ground and which remains insoluble without agglomeration in aromatic hydrocarbon solvents.¹

Upon this appeal Radiant attacks the validity of the Kazenas patent upon five separate grounds.

The first issue is presented by Radiant's contention that the Kazenas patent is lacking in patentable novelty. The prior art upon which Radiant mainly relies is a Japanese patent, the Matsuo and Nitta Patent No. 181,405, issued in 1950. This patent, Radiant asserts, discloses a thermoplastic resin made by co-condensing formaldehyde, sulfonamide and melamine.

The district court carefully considered the Japanese patent and, apparently relying on the testimony of Dr. Hatcher with respect to his experiments upon this patent, concluded:

"The Japanese resin, as described in the patent, thus has properties similar to those of the Kazenas resin in that it is thermoplastic and has a relatively high melting point, but it differs in at least one vital respect in that it is soluble in aromatic hydrocarbons, while the Kazenas resin is substantially insoluble."

¹Radiant was found to have infringed Claims 1, 2, 3, 4 and 9 of the Kazenas patent. Claim 2 is typical. It provides:

"A completely condensed, thermoplastic resin consisting essentially of the condensation product of at least one aldehyde component entirely selected from the class consisting of formaldehyde and paraformaldehyde, at least one aromatic monosulfonamide having two reactive amide hydrogens, where the sulfonamide group is attached directly to the aromatic nucleus through the sulfur atom, and at least one melamine compound selected from the class consisting of melamine, alkyl melamines having no more than one alkyl substituted amido nitrogen, and monohydric Alkanol modified methylol and alkyl methylol melamines, the amount of said melamine compound being an amount, not exceeding 50% by weight of the aromatic monosulfonamide, sufficient to render said condensation product substantially insoluble in aromatic hydrocarbon solvents but insufficient to render it thermosetting."

The court then pointed out:

“Both the Japanese resin and the Kazenas resin are composed of a sulfonamide, an aldehyde, and melamine, but in critically different proportions. The most significant difference is in the amount of melamine. The Japanese patent specified a ‘small’ amount of melamine which, in the single example set forth in the patent, is 5% by weight of the para-toluol-sulfamide employed. The Kazenas patent teaches the use of a substantial amount of melamine or melamine derivative ranging in amount from 11 to 50% by weight of the sulfonamide. Kazenas also teaches the use of a greater amount of aldehyde in relation to the sulfonamide.”

Radiant contends that a mere varying in proportions cannot constitute novelty and invention and that this is all that the Kazenas patent adds to the Japanese patent.

The general rule as stated in *Smith v. Nichols*, 1874, 21 Wall. 112, 88 U.S. 112, 119, 22 L.Ed. 566, is:

“* * * a mere carrying forward of new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent.”

In *Greene Process Metal Company v. Washington Iron Works*, 9 Cir., 1936, 84 F.2d 892, 893, this Court held unpatentable a discovery described as follows:

“Greene’s alleged discovery was that the desired result—removal of sulfur and other impurities from iron or steel—might be accomplished more effectively and more economically by increasing the percentage of silica in the slag used for that purpose. * * *”

[1] The test would seem to be whether the varying of proportions brings about a mere improvement in the

already discovered result or, on the other hand, accomplishes a new and unexpected result. In *Application of Aller*, Court of Customs and Patent Appeals, 1955, 42 CCPA 824, 220 F.2d 454, 456, it is stated:

“Normally, it is to be expected that a change in temperature, or in concentration, or in both, would be an unpatentable modification. Under some circumstances, however, changes such as these may impart patentability to a process if the particular ranges claimed produce a new and unexpected result which is different in kind and not merely in degree from the results of the prior art. * * * Such ranges are termed ‘critical’ ranges, and the applicant has the burden of proving such criticality. * * * However, even though applicant’s modification results in great improvement and utility over the prior art, it may still not be patentable if the modification was within the capabilities of one skilled in the art. * * * More particularly, where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation. * * *”

With reference to Radiant’s contention that the Kazenas patent lacked invention, the district court stated:

“Plaintiffs urge that it did not constitute invention for Kazenas to vary the proportion of melamine and aldehyde to achieve substantial insolubility in aromatic hydrocarbons. But the Japanese patent itself does not even suggest the possibility that a greater proportion of melamine and aldehyde might produce a resin substantially insoluble in aromatic hydrocarbons. Indeed, it would discourage experimentation along these lines. Since the patent states that, except for greater waterproofness and a higher melting point, the Japanese resin does not lose the characteristics of a conventional paratoluol-sulfamide resin, one could only conclude that the modification with melamine does not affect its solubility in aromatic hydrocarbons.

“It is possible that the mere fact that melamine-aldehyde resins were known to be insoluble in aromatic hydrocarbons might suggest to a skilled chemist that the modification of a sulfonamide-aldehyde resin with melamine might make the resin less soluble in aromatic hydrocarbons. But, it could not have been anticipated that sufficient melamine could be used to achieve substantial insolubility in aromatic hydrocarbons without simultaneously making the resin thermosetting.”

The testimony of Dr. Hatcher provides clear support. Emphasizing the overpowering nature of melamine and its tendency to thermoset, he concluded that the Japanese patent would not have led the ordinary chemist to greater experimentation in increasing the proportions of melamine. He discussed the many classes of melamine and sulfonamide compounds. He pointed out that a chemist faced with this multitude of possible components and with the economics of industrial research would actually be discouraged from experimentation along these lines and would tend to accept the original discouraging premise that an increase in melamine would result in thermosetting.

The district court's conclusion upon this issue, with which we agree and which we here adopt, was as follows:

“The sum and substance of the teachings of the prior art, including the Japanese patent, was that the properties of melamine-aldehyde resin could be modified to some extent by adding a small amount of a sulfonamide, and that the properties of a sulfonamide-aldehyde resin could be modified by adding a small amount of melamine. These teachings were narrow ones. They did not constitute such important and substantial discoveries that the ordinarily capable chemist could carry on from that point and in normal course produce the Kazenas resin. The Kazenas patent discloses the new and broader concept that melamine and sulfonamide, each in a relatively substantial

quantity, could be reacted together with an aldehyde to produce a distinct resin having some of the properties of a sulfonamide-aldehyde resin and some of the properties of a melamine-aldehyde resin, and other properties which are unique. The Kazenas resin represented a new arrangement of ingredients that produced a new, unexpected and useful result. The Court is satisfied that it was such an advance over the prior art as to constitute invention."

Radiant's second attack upon the validity of the patent is addressed to the fact that the limits of melamine are expressed in functional language. The claims provide (see footnote 1) that the amount of melamine shall be "an amount * * * sufficient to render said condensation product substantially insoluble in aromatic hydrocarbon solvents but insufficient to render it thermosetting."

Since the novelty for which Switzer contends is that this resin is both thermoplastic and insoluble, Radiant contends that this language violates the rule against the use of functional language at the precise point of novelty. Violation of this rule, Radiant contends, renders the patent invalid.

Many authorities are cited by Radiant in support of its position. As disclosed by these cases, the vice of a description in terms of function is that it may in either of two ways adversely affect the public interest: by broadening the claim beyond the scope of actual invention; or by rendering the description so vague that the actual scope of the patent is not made clearly apparent to those concerned.

General Electric Company v. Wabash Company, 1937, 304 U.S. 364, 58 S.Ct. 899, 902, 82 L.Ed. 1402, dealt with a patent upon a light filament which attacked the problem encountered by prior art that such filaments had a tendency toward "sagging and offsetting" which reduced

the life of the light bulb. The claim prescribed that the filaments should consist of grains "of such size and contour as to prevent substantial sagging and offsetting" during a commercially useful life for the bulb. The court stated in 304 U.S. at page 371, 58 S.Ct. at page 902:

"The claim uses indeterminate adjectives which describe the function of the grains to the exclusion of any structural definition, and thus falls within the condemnation of the doctrine that a patentee may not broaden his product claims by describing the product in terms of function. Claim 25 vividly illustrates the vice of a description in terms of function. 'As a description of the invention, it is insufficient, and, if allowed, would extend the monopoly beyond the invention.' "

Further, the court stated at page 372, 58 S.Ct. at page 903:

"The Circuit Court of Appeals below suggested that 'In view of the difficulty, if not impossibility, of describing adequately a number of microscopic and heterogeneous shapes of crystals, it may be that Pacz made the best disclosure possible, * * *.' * * * But Congress requires, for the protection of the public, that the inventor set out a definite limitation of his patent; that condition must be satisfied before the monopoly is granted."

In our case Switzer, in justification of the functional language, points out that the alternative would have been to state the critical lower limits precisely. This was done in the examples set forth in the specification. Switzer points to the fact that of the considerable number of melamine compounds encompassed by the patent, each has a different critical limit. It asserts that this renders it wholly unreasonable to expect the claims to be specific in this respect or to expect any further specificity than that which appears in the examples given.

In the General Electric case, the effect of the functional language was to broaden the claim to include *all* grains of whatever size or shape so long as they would accomplish the desired result. In our case the critical area is not enlarged in such a fashion. The critical point remains the same for each melamine compound used. It simply is not specified. But whether specified or unspecified the scope of the claim is precisely that of the invention.

[2, 3] Nor can it be said that this failure to specify the critical limit precisely results in a fatal vagueness of description. The claim must be sufficiently clear to allow others to reproduce the result at the end of the monopoly period and to enable contemporary inventors to ascertain whether or not they are infringing.

Upon this point the district court concluded:

“When the general description, the specific examples, and the claims are read together, the invention is so plainly defined that no one skilled in the art should have any difficulty in practicing it.”

The record supports this statement. There is testimony to the effect that “sufficient melamine to render the resin substantially insoluble” is a simple, clear test for an ordinary chemist to perform and one which does not require extensive experimentation in order that the precise critical limits be ascertained in a particular case. Under such circumstances, the fact that some preliminary testing is required does not render the claim invalid for vagueness. *Mineral Separation, Limited v. Hyde*, 1916, 242 U.S. 261, 37 S.Ct. 82, 61 L.Ed. 286.

[4] We conclude that the fact that the limits of melamine are, in the claims, stated in functional language does not render the patent invalid.

Radiant's third attack upon the validity of the patent is addressed to the sufficiency of the description contained

in the specification. Radiant contends that it does not meet the requirements of 35 U.S.C. § 112 that there be "a written description" which must be in "full, clear, concise and exact terms" directed to "any person skilled in the art."

Radiant first asserts that the specification, as distinguished from the claims, does not describe the insolubility of the product. In our view, the specification when read as a whole does sufficiently describe this feature.

Radiant contends that the record establishes that one skilled in the art could not reproduce the product from the description. It appears that the district court discounted the testimony upon which Radiant relies and favored the contrary testimony of Dr. Hatcher.

Radiant protests that Dr. Hatcher was not an ordinary chemist but an expert and that his ability to reproduce was not the proper test.

[5] The ability of "any person skilled in the art" to reproduce the product was a question for the trier of fact. It was for the district court to determine whether the steps followed by Dr. Hatcher were of a type which required an expert as distinguished from an ordinary industrial chemist. We cannot say that the court's findings in this area were clearly erroneous.

We conclude that Radiant's contentions in this respect are without merit.

Radiant next contends that the Kazenas claims, as Switzer here asserts them, are invalid because they were not, in their present form, included in the original application. The feature to which this contention is specifically addressed is the resin's insolubility in aromatic solvents.

The original application was filed January 26, 1954. The claims did not then provide that the amount of melamine was required to be sufficient to render the resin

substantially insoluble in aromatic hydrocarbon solvents. Early in 1954 Switzer adopted the Kazenas resin commercially. In 1956 Switzer learned that two competitors planned to introduce competitive products and, informing the Patent Office of this fact sought to expedite issuance of patent. Following interviews in the Patent Office, the amended claims upon which the patent ultimately was issued were presented May 2, 1957. They were unaccompanied by the oath of Kazenas and, Radiant contends, were presented after the public use period had expired and intervening rights of the public had accrued. Radiant contends that under these circumstances the feature of insolubility cannot be relied upon to impart novelty.

The defense of intervening rights for which Radiant contends has developed in cases dealing with reissue and divisional patents. It is apparently aimed at protecting the public against enlargement of the original claim to encompass discoveries by others and also at achieving an equitable balance between the right of the inventor to an adequate claim of that which he has invented and the public right to reliance upon the inventor's apparent disclaimer of such invention as is not claimed.

In the area of amendment prior to patent issuance a further consideration is the public interest in an adequate disclosure by the patentee of that which is sold to the public. In *Muncie Gear Works v. Outboard etc. Company*, 1942, 315 U.S. 759, 768, 62 S.Ct. 865, 869, 86 L.Ed. 1171, it was held, "The claims in question are invalid if there was public use, or sale of the device which they are claimed to cover, more than two years before the first disclosure thereof to the Patent Office." In *Wire Tie Machine Company v. Pacific Box Corporation, Ltd.*, 9 Cir., 1939, 102 F.2d 543, this court held the rule inapplicable in a case where the amendment complained of added narrower claims and not new matter and further held that such amendment needed no supplemental oath.

[6] Here the feature of insolubility was disclosed in the specifications of the original application, although its bearing upon the critical limit in the amount of melamine was not expressed. We are not then faced with a claim of new matter nor with an attempt to rectify an inadequate disclosure or to appropriate subsequent developments or discoveries. The amendment actually amounted to no more than a narrowing of the claims to articulate a limitation implicit in the specifications but not explicit in the claims themselves. The circumstances under which the amendment was filed would indicate that it resulted from the ordinary give and take of Patent Office procedures: the shaping of the expression of that which was sought in order to make it conform appropriately to that which it was felt could properly be granted.

We conclude under these circumstances that no intervening public rights can be said to have attached to the insolubility feature of the Kazenas patent or to the matters incorporated in the claims by amendment; that no supplemental oath was required.

Finally Radiant contends that the specification of the patent is inadequate to support a claim for a broad class of melamine derivatives. It is asserted that "there is no recipe given for the proportions of the entire class of melamine compounds by which one could be certain to obtain the critical result." It is pointed out that all that Kazenas did was to give recipes for two members of the class. Radiant concludes that Kazenas thus "asked the art to experiment with other members of the class to obtain the result which he desires." Stating its proposition in somewhat different language, Radiant contends that the patent must disclose that all members of the broad melamine class are effective to produce the alleged novel result.

The cases cited by Radiant have their root in *The Incandescent Lamp Patent*, 1895, 159 U.S. 465, at page 472, 16 S.Ct. 75, at page 77, 40 L.Ed. 221, where the court stated:

“Is the complainant entitled to a monopoly of all fibrous and textile materials for incandescent conductors? If the patentees had discovered in fibrous and textile substances a quality common to them all, or to them generally, as distinguishing them from other materials, such as minerals, etc., and such quality or characteristic adapted them peculiarly to incandescent conductors, such claim might not be too broad. If, for instance, minerals or porcelains had always been used for a particular purpose, and a person should take out a patent for a similar article of wood, and woods generally were adapted to that purpose, the claim might not be too broad, though defendant used wood of a different kind from that of the patentee. But if woods generally were not adapted to the purpose, and yet the patentee had discovered a wood possessing certain qualities, which gave it a peculiar fitness for such purpose, it would not constitute an infringement for another to discover and use a different kind of wood, which was found to contain similar or superior qualities. The present case is an apt illustration of this principle. Sawyer and Man supposed they had discovered in carbonized paper the best material for an incandescent conductor. Instead of confining themselves to carbonized paper, as they might properly have done, and in fact did in their third claim, they made a broad claim for every fibrous or textile material, when in fact an examination of over six thousand vegetable growths showed that none of them possessed the peculiar qualities that fitted them for that purpose. Was everybody, then, precluded by this broad claim from making further investigation? We think not.”

[7] In the instant case there is nothing in the record to suggest that the qualities discovered by Kazenas were not

common to melamine and to such of its derivatives as were specified in the claims, the only difference being in the critical limit in the amount of the component used. As we have already pointed out, there is evidence that the ascertainment of these specific limits in any particular case did not require extensive or undue experimentation. With respect to Radiant's contention that Switzer must establish the effectiveness of each member of the broad class, the district court stated:

"Plaintiffs have cited no authority and the court is aware of none that places such a burden on the defender of a patent."

We agree.

In our judgment this contention is without merit.

[8] We conclude that in all aspects challenged by Radiant, the Kazenas patent is valid.

Radiant next contends that it has not infringed the Kazenas patent. In this respect it looks not to the claims (which we have already held to be valid) but to the examples set forth in the specifications. It asserts that it uses more melamine (27.6% or 36.9%) than was used in the examples (13%); that it uses too little formaldehyde; that its process is different from that shown in the examples.

The amounts of melamine used by Radiant are well within the upper limit (50%) set by the claims. While the claims do not specify the amount of aldehyde, it is clear that it is such an amount as will permit complete co-condensation.

Radiant asserts that its proportions are closer to those of the Japanese patent than to those of the Kazenas patent and that it should accordingly be regarded as protected by prior art. Radiant concedes, however, that the Japanese patent is not adequate to meet its needs.

What it requires is that which the Kazenas resin provides: completeness of co-condensation and insolubility in aromatic solvents.

In our judgment then, the district court was not in error in concluding that Radiant's resins infringed the Kazenas patent.

[9] In several respects in post-trial proceedings (the settlement of findings, motions for new trial and to vacate judgment) Radiant attempted to introduce new matters of evidence. It offered proof of other patents to establish lack of invention. It offered testimony of Kazenas in another unrelated proceeding assertedly inconsistent with Switzer's position in the instant case. It offered testimony relating to post-decision tests run by it. It invited a second look at physical evidence which had been offered at trial to demonstrate the free flowing and insoluble character of the Kazenas resin, asserting that such second look would demonstrate that since trial the resin had agglomerated.

[10] All of this evidence was rejected by the district court for failure of Radiant to show diligence or justification for its failure to discover and present these matters at the time of trial. Radiant assigns error in this respect but we find no abuse of discretion in this ruling. The time for testing of proof is the time of trial. Our judicial system does not contemplate that the rights of litigants shall be held in abeyance for months or years in order that hindsight may provide a more accurate appraisal of evidence.

Radiant protests that the post-trial change in physical evidence should not be subject to the requirement of diligence. If the fact was that the resin would agglomerate and would not remain free flowing, Radiant could have established this by its own pre-trial experiments and have introduced evidence with respect to those experiments at the proper time. Post-trial experimenting with the evi-

dence produced at trial is no substitute for the proper and orderly presentation of proof. Furthermore, there is no evidence as to the conditions to which this exhibit had been subjected following trial and thus a proper foundation was not laid for the admissibility of this offered proof.

Radiant protests that a showing of diligence is not necessary where the proof offered shows a lack of clean hands on the part of the patentee; that it had offered proof of deception practiced by Kazenas and Switzer both on the Patent Office and on the district court. It contends that in the public interest, where the question of deception or unclean hands is at issue, the question can be raised at any time. *Hazel-Atlas Glass Company v. Hartford-Empire Company*, 1944, 322 U.S. 238, at page 246, 64 S.Ct. 997, at page 1001, 88 L.Ed. 1250, is cited where the court states:

“This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. * * * Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.”

However, it should be obvious that every disgruntled litigant cannot, in the name of public welfare, secure a new trial simply by charging fraud. In *Hazel-Atlas* the Supreme Court recognized this, stating in 322 U.S. at page 248, 64 S.Ct. at page 1002:

“The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and the * * * court may in the exercise of a proper discretion reject the petition * * *.”

In Hazel-Atlas the proof of fraud was clear. Not so in the instant case. Here the district court, after listening at great length to the contentions of Radiant’s counsel respecting its proof of deception, stated:

“* * * I don’t see any aspect of fraud or misrepresentation or chicanery involved in the application for the patent in this case * * *.”

and later:

“I abhor fraud and misrepresentation and I never have any hesitancy in turning aside any decision or in granting relief in cases of that kind. But I don’t discern in this case anything of that sort.”

[11] We have examined the matters charged by Radiant and the offered proofs and concur in the views of the district court. It was not then an abuse of discretion for the district court (bearing in mind both lack of diligence and the showing made with respect to fraud and the public welfare) to deny a new trial upon the ground of unclean hands or to refuse to delay judgment in order that hearing might be had on the newly tendered issues.

Affirmed.

Appendix C

Abstract of testimony of Dr. David B. Hatcher taken in open court on January 15 and 16, 1959 and abstracted from pages 362-479 of the printed transcript of record on appeal No. 16,780.

Q. Are you familiar with the Kazenas patent in suit?

A. Yes, I am.

Q. Are you familiar with the resins described therein?

A. Yes, I am.

Q. Are these resins co-condensation products?

A. I would call them such.

Q. Based on your observations of industrial thermoplastic and thermosetting resins, what, if anything, is unusual about the Kazenas resins?

A. Kazenas resin is unusual in that I know of no other thermoplastic resin containing substantial amounts of melamine. Normally, melamine-containing resins are thermoset.

In addition to that, it is insoluble in toluene, while being soluble in acetone; and, being soluble in acetone, it exhibits no separation, indicating that it is a single resin, not a mixture of resins.

Q. What, if anything, is unusual about a resin being thermoplastic and yet insoluble in toluene?

The Court: And yet what?

Mr. Manahan: And yet insoluble in toluene.

A. (By the Witness): The common thermoplastic resins are all either swelled or dissolved by aromatic solvents. I should say swelled or softened or dissolved.

Q. (By Mr. Manahan): And toluene is an aromatic solvent?

A. Yes, it is one of the common aromatic solvents.

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Q. (By Mr. Manahan): How does Kazenas teach that no unreacting ingredients are present in its resin?

A. By teaching that it's insoluble in toluene.

The Court: I am sorry, I didn't hear your answer.

The Witness: I say that it is insoluble in toluene.

The Court: I still didn't get it.

The Witness: Insoluble in toluene.

The Court: Insoluble.

The Witness: Or, rather, I should say in aromatic solvents.

* * * * *

Q. What does the Kazenas patent teach you about the melamine content with relation to insolubility in toluene or an aromatic solvent?

A. It says that there must be sufficient melamine content to cause insolubility in aromatic solvents.

* * * * *

Q. (By Mr. Manahan): What, if anything, is critical about the solubility of a resin used as a pigment?

A. It is necessary that it be sufficiently insoluble that it will not agglomerate in the vehicle that is used.

Q. How difficult is the solubility test for a resin?

A. It is not difficult. It is readily observable.

* * * * *

Q. (By Mr. Manahan): Dr. Hatcher, are you familiar with Japanese Patent, the translation of which is Plaintiffs' Exhibit 13? A. Yes, I am.

Q. What melamine proportion does this patent disclose? A. It shows a melamine proportion of 5%.

Q. Five percent of what?

A. At 5% of the sulfonamide resin.

Q. What formaldehyde proportion does this disclose?

A. It shows a molecular ratio of one mole of formaldehyde to each mole of sulfonamide resin.

Q. Have you ever carried out the procedure of the Jap patent that is Plaintiffs' Exhibit 13?

A. It has been carried out under my direct supervision in my presence.

Q. Have you an example of the result that you obtained? A. Yes, I have.

Q. Give us the exhibit number, will you, please?

A. It is Exhibit O.

Q. Do you recall the softening point of this resin?

A. As I recall, the softening point was approximately 89 degrees Centigrade.

Mr. Hoppe: May it please the Court, I would like to have the record show that this experiment, like our experiments, was conducted Ex Parte. It was conducted without notice to us, which is contrarywise to the objection made to our testimony, and that we were not invited to be present.

I do not object to it. I just want to show that these tests were made under the same circumstances as our tests were.

The Court: What is sauce for the goose is sauce for the gander.

Mr. Hoppe: Yes.

The Court: Go ahead.

Q. (By Mr. Manahan): Did you follow exactly the procedure set forth in the Japanese Patent?

A. The procedure in the Japanese Patent was followed explicitly.

Q. What was the solubility of the resulting resin?

A. It was soluble in toluene.

* * * *

Q. Have you ever carried out the procedure of the Kazenas Patent, Example 5? A. Yes, I have.

Q. Do you have an example of the resin obtained?

A. Yes, I have. It is Exhibit N—N as in Nelly, your Honor.

Q. What is the softening point of that resin?

A. As I recall, it was 112 degrees Centigrade.

Q. What was the solubility of this resin in toluene?

A. It was insoluble in toluene.

Q. How can you tell?

A. By dispersing it in toluene and leaving it. It did not agglomerate. It remained free-flowing.

Q. When was this resin prepared?

A. It was prepared in late August, 1958.

Q. Have you had that sample under your watch and care ever since?

A. I have had it in my possession since that time.

Q. Is the resin still insoluble?

A. The resin still is insoluble. It is free-flowing.

* * * *

Q. Would you expect that the softening point of a resin such as the Kazenas resin would change as much as 20 to 30 degrees Centigrade over a period of nine months?

A. No, I would not expect that.

Q. Can you offer any logical explanation for it?

A. No, I cannot.

Q. Would you expect solubilities to change in this period of time in the same type of resin?

A. No, I would not.

Mr. Manahan: That is all, your Honor. Cross-examine.

* * * *

Q. Now, is Example 2 of the Kazenas Patent substantially insoluble in aromatic hydrocarbon solvents?

A. I have not checked that personally.

* * * *

Q. In the Japanese resin, I think that we are in agreement that that is not substantially insoluble in aromatic hydrocarbon solvent? A. That is correct.

Q. And it is your position that Example 5 of the Kazenas resin is essentially insoluble in hydrocarbon solvents? A. Yes, it is.

Q. At what point between 5% of the Japanese Patent and 13% of the Kazenas Example 5 does one note a change from insolubility—I mean from solubility to insolubility?

A. I do not have that information. I know that at 5% it is soluble, at 13% it is insoluble.

Q. Have you made any tests to determine what would happen if you would increase the percentage of melamine in the Japanese example by gradual increment to the percentage of melamine in Example 5 of Kazenas?

A. No, I have not.

Q. As a man skilled in the art, if we were to increase the percentage in the Japanese example from 5% to 7%, would there be a decrease in solubility in aromatic hydrocarbon solvents?

A. I cannot say definitely; I can only speculate. At some point there would come the point at which the raw material would be free-flow. I do not know at what point that would be between 5 and 13%.

Q. Now, Dr. Hatcher, in your examination—my notes may not be accurate, so I may be misstating what you say—but I believe that you testified that you saw in the Kazenas Patent a teaching that resin examples 1 to 6 were practically insoluble in aromatic hydrocarbon solvents.

Before asking the question I want to ask you if I correctly stated your contention?

Mr. Sherman: Where do you find that?

Mr. Hoppe: My notes may be inaccurate. That is why I am asking if I correctly stated his contention.

The Witness: Would you repeat that, please?

Mr. Hoppe: Would you repeat that to the witness, Mr. Reporter? (Record read.)

A. Yes, I believe there is a teaching there that those materials are insoluble in aromatic hydrocarbon solvents.

Q. (By Mr. Hoppe): Would you please refer to the language to which you have reference by chapter and verse? A. I find on page—rather, column 7—

Q. Column 7?

A. Line 21 after the capital A. “* * * sufficient to render said completely condensed, thermoplastic resin substantially insoluble in aromatic hydrocarbon solvents but insufficient to render it thermosetting.”

Q. All right. Do you find that language any other place or language to that effect any other place in the specification? A. I have not looked specifically for it.

Q. I wish you would, because this will become rather important.

A. I find in column 6, line 4: “The pigments prepared in the manner described in the foregoing examples”—this refers to Example 13. Pardon me. I read again: “The pigments prepared in the manner described in the foregoing examples are insoluble in water and aliphatic hydrocarbon solvents, are practically insoluble in aromatic hydrocarbon solvents, * * *”

Q. And it continues: “are soluble in ketones and solvent esters.” A. That is correct.

* * * * *

Q. Now, let's refer to Example 2. Do you find any teaching any place in the patent outside of the language you refer to in the claims that that resin is substantially insoluble in aromatic hydrocarbon solvents?

A. In general I believe this is another example that ties in with the remainder of the patent. Consequently I have not studied it from the standpoint of whether each example has a complete description of what the material is other than that they do all have somewhat the same properties. They all fit within the bounds of the patent.

Q. I would like it, if you will during the next recess, could examine the specification and see if you can find any language other than the language contained in the claims

and the language referring to the pigments which you read to us which refer in any way specifically to solubility in aromatic hydrocarbon solvents.

* * * * *

Q. Where do you find in the Kazenas patent a teaching that the solubility in aromatic hydrocarbon solvents is keyed to the quantity of melamine?

A. In reading the entire patent it gives that impression, that enough melamine is required to achieve that result.

Q. Would you please read one sentence that gives that expression?

A. I did in just reading the first column, starting about Line 30, it is speaking of the thermoplastic resin, and it says down about Line 43, "On the other hand, the new resin, unlike the melamine-aldehyde resins, is soluble in certain solvents and is thermoplastic."

No, that isn't the one I was searching for.

Q. Do you find any language in there referring to insolubility in aromatic hydrocarbon solvents?

A. Not there. In the patent I do. I find it in a number of places.

Q. Well, let's find one.

A. Let's take Column 1, Line 57:

"The new resin is insoluble in many common vehicles and can therefore be suspended in such vehicles without coalescence or agglomeration."

The common vehicles are, normally, of an aromatic nature.

Q. Are not aliphatic hydrocarbon solvents used in coatings?

A. They are used to the extent that it is possible to use them, but, in general, it is necessary to have aromatic solvents in order to get sufficient solubility. They are normally used in coating resins.

Q. Are ketones not used as solvents in the paint field?

A. They are used in some, but they are much less common. They are not a common solvent.

Q. And are solvent esters not used in the paint field?

A. Yes. They are not as common as the aromatic solvents, though.

Q. Can you read in the claim that many common solvents, the relationship between the minimum quantity of melamine and insolubility in aromatic hydrocarbon solvents?

A. I would put that construction on it in view of other passages in the patent referring to that more specifically.

* * * *

Q. (By Mr. Hoppe): Now, Dr. Hatcher, another well-known quality of a sulfonamide-aldehyde resin is that it is soluble in aromatic hydrocarbon solvents, is that not correct?

A. Sulfonamide-aldehyde resins are soluble.

Q. It was a well-known quality of melamine-aldehyde resins that they were insoluble in aromatic hydrocarbon solvents? A. That is correct.

Q. And I suppose if I would ask you as to the problem it would be to find the point at where you would change from the qualities of one to the other in an intermixture, we would again be confronted with this industrial problem which you pointed out?

A. The problem is in choosing the problem. Once the problem is chosen, if you apply enough manpower and enough money to it, you can investigate it. But the real problem is in choosing the area of activity.

* * * *

Q. Now, Dr. Hatcher, I would like to pose a hypothetical question to you. I would like to propose that you take an alkyl methylol melamine and substitute it for the melamine of any one of Examples 1, 2, 3, 4, 5 and 6, and

you select whichever one you want, whichever example you want, and whichever form of alkyl methylol melamine you desire, and state what percentage of alkyl methylol melamine would be required in any one of those examples where you make the substitution to obtain a completely condensed thermoplastic resin substantially insoluble in aromatic hydrocarbon solvents, but insufficient to render it thermosetting.

A. That was such a long question that I can't follow all of it. May I have it read back?

Q. Will you read the question, please?

(Record read by the reporter.)

A. My assumption, I would use monomethyl melamine substitute in Example 5 in the same approximate percentage as Example 5. There would not be a substantial difference. What would result would be that the exact proportions of formaldehyde to active amide groups would be somewhat higher; however, that would not be disadvantageous.

Q. Would you use the same temperatures as those given in Example 5?

A. Yes, I would.

Q. And when you finished with your experiment, would the product be completely condensed?

A. That would be my assumption, yes.

Q. Could you predict that it would be completely condensed with accuracy? A. I believe so.

Q. Would the product be thermoplastic?

A. My best guess is that it would be.

Q. Can you predict that accurately?

A. Not with 100% accuracy, no.

Q. Would the product be substantially insoluble in aromatic hydrocarbon solvents?

A. I would think from reading the patent that it would be.

Q. Can you predict that it would be?

A. I would predict that it would be.

Q. Now, let us substitute for the alkyl methylol melamine example that you selected for Example 5 one containing a butyl group as the alkyl group. Would you then use the same weight proportions as those given in Example 5?

A. I probably wouldn't. I would probably increase the percentage of the alkyl melamine somewhat.

Q. How would it increase it? Why?

A. Because you're cutting down the—as you increase the size of the alkyl group, you increase the molecular weight of the melamine and, if you increase the molecular weight of the melamine, you are putting less reactive melamine in than you were previously.

Now, in the case of the methyl melamine, I said we could substitute on an equal basis because the molecular weights are not substantially different. When you start getting a butyl group, then you're increasing the molecular weight of that substituted melamine to the point where you are throwing the proportion of melamine and the sulfonamide completely off. I am speaking of the molar proportions.

Q. So you would use, instead of the definitions of grams of the materials given in Example 5—you would convert them to molar proportions and you would endeavor to have as many of the melamine nuclei in your modified Example 5 that there appear in Example 5 of the Kazenas patent; is that right? A. Approximately.

Q. And when you would do that, would you be certain that the product would be insoluble in aromatic hydrocarbon solvents?

A. In organic chemistry you are never certain of an experiment that you haven't previously run.

Q. Would you be certain that the product was not thermosetting?

A. I would not be certain. I would be willing to predict that it would not be thermosetting; however, there is never any certainty.

Q. Now, referring to a change of the sulfonamide in example 5, what change would you make if you were to substitute benzene sulfonamide for the mixture of O and P toluene sulfonamide?

A. I would increase the amount of formaldehyde slightly in order to have——

Q. Is that the only change which you would make?

A. I might adjust the amount of melamine up slightly to get the same molar ratios.

Q. What would you do if you were to substitute an alkyl derivative of benzene sulfonamide in which the sulfonamido group is attached directly to the aromatic nucleus to the sulphur atoms?

A. You are speaking, for instance, of ethyl benzene?

Q. Let's take that for example.

A. I would probably use the same proportions in the example.

Q. Would you be certain beforehand that you would have a thermoplastic resin?

A. I will answer that as I did previously, that I would be willing to predict so, but without having actually run it myself, I would not be absolutely certain.

Q. Now, let's assume that we take a different alkyl, an alkyate such as the Hexal group, what would you then do?

A. I presume you are referring to alkyl?

Q. Alkyl.

A. In that case I would probably adjust the proportions slightly to arrive at approximately the same molar ratio, the same proportions on a molar basis.

Q. Now, in making your prediction, if you found out that the product was thermoplastic but that it was soluble in aromatic hydrocarbon solvents, what change would you make in the example to make it substantially insoluble?

A. This is getting extremely hypothetical. First of all, we will assume that it would be aromatic hydrocarbon soluble and not you are asking what we would do to change it, if we wanted——

Q. Yes, sir.

A. I don't find anything—I shouldn't say I don't find——

The Reporter: Will you raise your voice, please, Doctor?

A. Certainly. In reading the patent, I haven't come upon any directions on how you would adjust every minor instance that might happen.

Q. Would a man skilled in the art as of January 26, 1954,—and we are again speaking to this hypothetical man skilled in the art to which we referred at the close of court yesterday—would he know what to do without referring to the patent directions?

A. If he found that it was aromatic hydrocarbon soluble and you supposedly in this hypothetical situation had this resin of Kazenas——

Q. It is thermoplastic and it still is soluble; would he have been able to alter the ingredients in this hypothetical example as of January 26, 1954, to meet the requirement of the claim?

A. You mean he had complete knowledge of the entire Kazenas patent?

Q. He has no knowledge of the Kazenas patent.

A. In that case I would think it would be very difficult to predict.

Q. Dr. Hatcher, I hand you Defendant's exhibits L, M, N and O, which I believe were made under your direction.

A. That is correct.

Q. Who made them? A. Mr. Gray.

Q. Thomas Gray who is sitting at counsel table here?

A. That's correct.

Q. When did he make them?

A. As I recall, it was August 27th and 28th of 1958.

Q. And where did he make them?

A. At the Switzer Brothers laboratory.

Q. Where were you when he made them?

A. I was standing right beside him all the time.

Q. Were you watching everything that he did?

A. I watched very carefully.

Q. Did you make notes of what he did?

A. He did not make notes at that time, but notes were made.

Q. Who made the notes?

A. Mr. Manahan made the notes.

Q. Was Mr. Manahan there at that time?

A. Yes, he was, and I checked to make sure that the notes were properly made.

Q. Do you know who has those notes now?

A. No, I do not.

Q. After the samples were completed—How long did it take to complete them first? A. Two days.

Q. And were you there during the entire two-day period? A. Yes, I was.

* * * * *

Q. After these Examples, L, M, N and O were made—First, were they all made the same day?

A. No, they were made one day and—Well, I will have to check that. I believe that—I can't state which were made which days. They were both made during that two-day period.

Q. And after the resins were completed, did you test the Japanese resin to see if it was friable?

A. Yes, we did.

Q. Was it friable? A. Yes, it was friable.

Q. Did you save any of the resin of those examples?

A. The only one—well, all that I have are these examples in toluene. I do not have the resins themselves.

Q. And after you made the resins, would you state what you did with these specific resins to make those examples that you have there?

A. Yes. We ground each one of them in a mortar and pestle and we put 10 grams of the resin with 40 grams of toluene into each of these bottles and shook them up to determine the solubility. We also ran melting point tests.

* * * *

Q. Now, after you put the material in these bottles, what did you then do with the bottles?

A. I put them in a box and took them with me.

Q. Back to Chicago? A. That's right.

Q. And they have been in your custody ever since?

A. They have.

Mr. Hoppe: No further cross-examination.

* * * *

Q. Dr. Hatcher, you were also asked if you would examine the Kazenas patent and find any statements relating to—Oh, strike that question.

You were asked to examine the Kazenas patent and find any statements which would lead you to believe that the melamine content of the Kazenas resin was such that it was insoluble in aromatic hydrocarbon solvents, and you did examine the patent during the recess but you were not asked the question again on cross-examination. I will ask it to you now.

A. Yes, I find four references to it.

Q. Could you read those, please?

A. On Column 1, line 57, it says:

“The new resin is brittle and friable below its softening point”—No, that's not it. “The new resin is insoluble in

many common vehicles and can therefore be suspended in such vehicles without coalescence or agglomeration."

Then going to Column 5, the portion that we just read where it says, "If desired, the undyed resin may be prepared as in Examples 1 to 6 and dyed by immersion in an aqueous dye bath," which refers on to Column 6 where it says at line 4:

"The pigments prepared in the manner described in the foregoing examples are insoluble in water and aliphatic hydrocarbon solvents, are practically insoluble in aromatic hydrocarbon solvents, and are soluble in Ketones and solvent esters."

Then in that same column, line 21,

"Based on these physical characteristics, the pigments may be used in vehicles which are non-solvents for the pigments to form various types of inks and the like."

These would lead to the very strong conclusion that they are insoluble in aromatic solvents.

Q. Is it the melamine that imparts the insolubility to the Kazenas resin, combined in the resin body?

A. When combined in, yes, I would say that it very probably is. I know of nothing else in there which could cause that.

* * * * *

Recross Examination

Q. (By Mr. Hoppe): Dr. Hatcher, to a man skilled in the art, is there any difference between being soluble in common vehicles and the usual solvents? This is without reference to the patent. I am just asking you about the words "common vehicles" and "usual solvents."

A. There could be some difference, slight difference. Here I am sure it is meant in that manner, however.

* * * * *

Q. Now, turning to the language which you find concerning the insolubility in aromatic hydrocarbon solvents,

with reference to the word "pigments," appearing in line 4, all of the——

A. (Interposing.) Of what column?

Q. Line 4 of Column 6. A. Column 6?

Q. Yes; all of the pigments have a dyestuff in them, do they not, whether they are made according to Examples 7 to 13, as originally stated, or as Example 12 with the last sentence added?

A. Would you state the numbers of the Examples?

Q. 7 to 13, as originally stated, plus the added paragraph under Example 12. A. Yes.

Q. Now, the pigments prepared in the manner prescribed in the foregoing examples, therefore, all have the following ingredients: a melamine, a sulfonamide, an aldehyde, and a dyestuff, is that correct?

A. No, that is not correct. Those examples have a resin of the Kazenas type and a dyestuff, and the resin does not contain a melamine, a sulfonamide and formaldehyde, it is reacted resin resulting from a reaction of those materials.

Q. Now, taking your answer, is there anything that you read in the words that you read to the Court which defines which of those four ingredients contributes to the insolubility in aromatic hydrocarbon solvents?

A. No, there is nothing that I can see that says which one contributes to insolubility.

Q. Referring to your language that you found: the new resin is insoluble in many common vehicles and can therefore be suspended in such vehicles without coalescence or agglomeration, is there anything that you see in that sentence which tells you which of the ingredients is responsible for the lack of solubility in aromatic hydrocarbon solvents?

A. No, and often it's a new combination that gives you the different properties, rather than just the fact that

you put the two things together and mix them. When you mix them, you react them and get a property that isn't the property of either one of the original ingredients.

Q. Now, do you find anything in the patent which states what it is that contributes to the insolubility in aromatic hydrocarbon solvents?

A. . . . Yes, it does say sufficient to render said completely condensed thermoplastic resin substantially insoluble. I will have to correct my testimony.

Q. That is the language keys it to the amount of melamine? A. Yes, that's right.

Q. That is the only language which keys it to the amount of melamine, is it not?

A. With regard to softening point on Page 3, it says: If too small a quantity of melamine is used, the softening point of the product will differ only slightly from the softening point of the sulfonamide formaldehyde resin.

Q. Now, that is the only language you find in the specification that relates to the lower quantity of melamine, isn't it, other than that which you read in the claims? A. That is all I find at this time, yes.

Mr. Hoppe: That's all.

Redirect Examination

Q. (By Mr. Manahan): As a chemist, Dr. Hatcher, do you recognize from the Kazenas patent that the combination of a melamine component into the resin will impart toluene insolubility into the resin?

A. Yes. As I testified previously, there is nothing else there that could do it. It has to be the melamine that does it.

Mr. Sherman: That's all, Dr. Hatcher.

Mr. Hoppe: That's all.

Appendix D

Opinion of the Court of Appeals for the Ninth Circuit
filed June 30, 1965, as reported in 348 F.2d 244.

Harry P. LOCKLIN and Elmer J. Brant, General partners doing business
under the firm name of Radiant Color Company, Plaintiffs-Appel-
lants,

v.

SWITZER BROTHERS, INC., a corporation, Defendant-Appellee.

No. 19467.

United States Court of Appeals
Ninth Circuit.

June 30, 1965.

The plaintiffs were found guilty of civil contempt for violation of an injunction against infringement of defendant's patent, and they appealed from the order of the United States District Court for the Northern District of California, Southern Division, William T. Sweigert, J. The Court of Appeals, Merrill, Circuit Judge, held that plaintiffs were entitled to trial on issue as to whether the accused formula fell within narrow limits of patent, notwithstanding that issue had not been clearly directed to district court's attention, where plaintiffs had been encouraged to submit to inappropriate summary proceedings which may well have contributed to result that issues not overly apparent in absence of cross-examination were not thoroughly explored and presented at time of argument.

Order affirmed in part and the matter remanded with instructions.

1. Affidavits (Key) 18

Receipt of proof in form of affidavits was error where factual determinations were required on critical issues raised in civil contempt case for violation of injunction

against infringement of patent. Fed.Rules Civ.Proc. rule 43(a, e), 28 U.S.C.A.

2. Patents (Key) 326(4)

The erroneous receipt of proof in form of affidavits in civil contempt case for violation of injunction against infringement of patent was invited if not waived, where plaintiffs expressed view that witnesses should be brought before court but did not object to decision that the matter should proceed initially by affidavits and that if they disclosed genuine conflicts in contentions of fact or opinion that question of calling of witnesses might then be renewed, and plaintiffs, at time of hearing, did not renew their contention that issues disclosed by affidavits would justify the calling of witnesses. Fed.Rules Civ.Proc. rule 43(a, e), 28 U.S.C.A.

3. Patents (Key) 326(4)

In civil contempt case for violation of injunction against infringement of patent, plaintiffs were entitled to trial on issue as to whether accused formula fell within narrow limits of patent, notwithstanding that issue had not been clearly directed to district court's attention, where plaintiffs had been encouraged to submit to inappropriate summary proceedings which may well have contributed to result that issues not overly apparent in absence of cross-examination were not thoroughly explored and presented at time of argument.

Carl Hoppe, Ernest M. Anderson, San Francisco, Cal., for appellants.

Harold C. Hohbach, Flehr & Swain, San Francisco, Cal., Benjamin H. Sherman, Hill, Sherman, Meroni, Gross & Simpson, Chicago, Ill., for appellee.

Before BARNES, JERTBERG and MERRILL, Circuit Judges.

MERRILL, Circuit Judge:

This appeal is taken from an order adjudging appellants guilty of civil contempt for violation of an injunction against infringement of appellee's patent. The injunction was issued pursuant to mandate of this court following our decision holding appellee's patent valid and infringed, *Locklin v. Switzer Bros., Inc.*, 299 F.2d 160 (9 Cir. 1961), cert. denied, 369 U.S. 861, 82 S.Ct. 950, 8 L.Ed.2d 18 (1962).

The patent there in issue, the Kazenas patent,¹ was for a resin which was a co-condensation of a melamine, a sulfonamide and an aldehyde, and which possessed characteristics of substantial importance in the manufacture of pigments for use in fluorescent paint. Following our earlier decision and the injunction against infringement, appellants produced and utilized a resin designated as "4-C," which utilized the three ingredients of the Kazenas formula with the addition of a relatively small amount of urea. Appellee then initiated these proceedings contending that production of the 4-C resin constituted a violation of the court's injunction. The District Court agreed.

Appellants make two contentions upon this appeal.

[1, 2] The first relates to the procedures followed by the District Court. The court treated the matter as one on motion under Rule 43(e) F.R.Civ.P. rather than as a trial for infringement under Rule 43(a). Accordingly proof was received in the form of affidavits. Appellants now assert that this was error, since factual determinations were

¹Letters patent No. 2,809,954, assigned to Switzer.

required upon critical issues. We agree.² The error, however, would appear to have been invited if not waived.

At the outset of the proceedings appellants expressed the view that the matter could not adequately be tried on affidavits and that "on a matter of such seriousness as this we should bring our witnesses before the court." It was ultimately decided, however, without objection by appellants, that the matter should proceed initially by affidavit; that if an analysis of the affidavits disclosed genuine conflicts in contentions of fact or opinion the question of the calling of witnesses might then be renewed. The record does not disclose that appellants, at the time of hearing, renewed their contention that issues disclosed by the affidavits would justify the calling of witnesses. No offer of oral testimony was made.

[3] Upon the merits of the dispute appellants contend that their accused formula 4-C does not fall within the narrow limits of the Kazenas patent as delineated in our earlier opinion. Notwithstanding the fact that the amount of urea used by them is relatively small, still, they assert, the urea is used in place of melamine, and reduces the amount of melamine which is utilized to a point where the melamine alone is not sufficient to render the product substantially insoluble in aromatic hydrocarbon solvents.

Appellee asserts that this is not the proper test and that the claims of the Kazenas patent should not be so limited. It points out that the amount of melamine utilized by appellants is well within the spread fixed by the

²That trial under Rule 43(a) is the appropriate method of resolving issues raised by opinion testimony in patent cases is suggested in Moore's Federal Practice, § 43.03, where it is stated in comment upon this rule:

"It follows, therefore, that the practice under Equity Rule 48, in patent and trade-mark actions, of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion, is no longer proper."

minimum and maximum limits set forth in the Kazenas claims and within the area covered by the examples given. It contends, as was argued to the District Court, that the true issues are whether the 4-C resin is equivalent to the infringing resin to which the injunction was directed, and whether the urea was essential to produce the desired characteristics of 4-C.

We cannot agree. In our judgment if appellants' contentions are factually correct there would be no infringement. In our earlier opinion we ruled that the use of this functional language in specifying the amount of melamine required (an amount sufficient to render the condensation product substantially insoluble in aromatic hydrocarbon solvents, but insufficient to render it thermo-setting) did not invalidate the claims, but by the same token it served to fix precisely the limits of the claims.

Upon the specific issue here raised by appellants the District Court has made no findings. It does not appear, however, that this precise issue was clearly directed to the court's attention.

We are thus hard put to find reversible error upon the record as to either of appellants' contentions.

We do feel, however, that in all fairness appellants are entitled to trial upon this issue. While the District Court acted with commendable concern for the conservation of trial time, the result was to encourage counsel to submit to summary proceedings, which, as a matter of hindsight, would now appear to have been inappropriate. The summary character of the proceedings, in turn, may well have contributed to the result that issues not overly apparent in the absence of cross-examination were not thoroughly explored and presented at the time of argument.

The record does not, however, suggest that trial upon any other issue is similarly justified under the circumstances. In all other respects the order of the District Court is entitled to affirmance.

Accordingly the matter is remanded with instructions that the order of the District Court be set aside and that trial be had upon the sole question whether, in the 4-C resin, the amount of melamine utilized is such as to bring the resin within the limits of the claims of the Kazenas patent as those claims are delineated in our former opinion.

Appendix E

**Memorandum of Decision of the District Court
filed February 17, 1966.**

In the United States District Court for the
Northern District of California,
Southern Division

No. 36995

Harry P. Locklin and Elmer J. Brant,
general partners doing business under
firm name of Radiant Color Company,
Plaintiffs,

vs.

Switzer Brothers, Inc., a corporation,
Defendant.

MEMORANDUM OF DECISION

SWEIGERT, J.

This case is before the Court on a petition filed by defendant Switzer Brothers, Inc., (hereinafter referred to as Switzer) on May 8, 1963, for an order adjudicating plaintiffs, doing business as Radiant Color Company (hereinafter referred to as Radiant), in civil contempt for violation of the judgment of this Court, entered on November 17, 1959.

That judgment held that claims 1, 2, 3, 4 and 9 of Switzer's Kazenas patent were valid and were infringed by certain fluorescent pigments manufactured by Radiant.

On appeal, the judgment was affirmed, *Locklin v. Switzer Bros., Inc.*, 299 F.2d 160 (9th Cir. 1961).

On May 2, 1962, an injunction was entered permanently enjoining Radiant from making, using, selling or offering for sale, except under license from Switzer any fluorescent pigment embodying or manufactured by the use of the inventions disclosed in the above claims of the Kazenas patent.

On March 31, 1964, this Court found Radiant guilty of civil contempt for violation of the injunction. Upon appeal, the Court in *Locklin v. Switzer Bros., Inc.*, 348 F.2d 244 (9th Cir. 1965) remanded the case for a determination of the specific question whether, in Radiant's accused 4-C resin, the amount of melamine utilized is such as to bring the resin within the limits of the claims of Switzer's Kazenas patent, No. 2,809,954, as those claims were delineated in the Court's prior opinion in 1961.

Pursuant to the remand, this Court held an evidentiary hearing on the above question from October 11, 1965, to October 15, 1965.

Radiant contends that its accused formula 4-C resin does not fall within the following functional language of claim 2 of the Kazenas patent:

“[T]he amount of said melamine compound being an amount . . . sufficient to render said condensation product substantially insoluble in aromatic hydrocarbon solvents. . . .”

Specifically, Radiant contends that, notwithstanding the fact that the amount of urea used by them in the 4-C resin is relatively small, the urea is used in place of melamine, and reduces the amount of melamine to a point where the melamine alone is not “sufficient to render said condensation product substantially insoluble in aromatic hydrocarbon solvents.”

The 1965 Court of Appeals decision held that, if Radiant's contention is factually correct, there would be no infringement, stating with regard to the above language of claim 2 of the Kazenas patent:

"In our earlier opinion we ruled that the use of this functional language in specifying the amount of melamine required . . . did not invalidate the claims, but by the same token it served to fix precisely the limits of the claims." *Locklin v. Switzer Bros., Inc.*, supra at 246.

In its earlier opinion the Court had found that the language was not vague, stating:

"There is testimony to the effect that 'sufficient melamine to render the resin substantially insoluble' is a simple, clear test for an ordinary chemist to perform and one which does not require extensive experimentation in order that the precise critical limits be ascertained in a particular case. Under such circumstances, the fact that some preliminary testing is required does not render the claim invalid for vagueness." *Locklin v. Switzer Bros., Inc.*, supra at 166.

The Court had also pointed out the reason why the lower limit of the amount of melamine, which would render the resin substantially insoluble, could not be stated in precise quantitative terms, stating:

"Switzer points to the fact that of the considerable number of melamine compounds encompassed by the patent, each has a different critical limit. It asserts that this renders it wholly unreasonable to expect the claims to be specific in this respect or to expect any further specificity than that which appears in the examples given." *Locklin v. Switzer Bros., Inc.*, supra at 165-66.

Defendant Switzer, therefore, has the burden of showing the following in order to establish that Radiant is in civil contempt of this Court's injunction.

1. A simple, clear, reliable test for an ordinary chemist to perform and one which does not require extensive experimentation to show whether the accused resin contains sufficient melamine to render it substantially insoluble in aromatic hydrocarbon solvents.

2. That in fact the accused resin contains sufficient melamine to render it substantially insoluble in aromatic hydrocarbon solvents.

In order to sustain this burden, Switzer relies on two different kinds of tests: (1) the quick *qualitative* test, which was the test used at the original infringement trial and (2) the *quantitative* test.

Qualitative Tests

In the qualitative tests, Switzer manufactured and used a resin consisting of a co-condensation reaction of melamine, sulfonamide and formaldehyde in the same mole proportions as in the accused 4-C resin (i.e., 7 moles of formaldehyde, 4 moles of sulfonamide and 1 mole of melamine). Switzer eliminated entirely the one-half mole of urea from the test resin in order to show that there was sufficient melamine, without the urea, to render the resin substantially insoluble in aromatic hydrocarbon solvents.

Switzer conducted two qualitative tests. The first test was conducted on September 25, 1965, at Cleveland, Ohio, in the presence of Radiant. On that date, Switzer placed a measured quantity of its test resin in separate containers each holding one of the three aromatic hydrocarbon solvents—benzene, toluene and xylene.

The second test was conducted at trial, at which time Switzer placed a roughly measured quantity of its test resin in containers holding each of the aforesaid hydrocarbon solvents.

Both parties are in agreement that, if a finely ground resin is placed in an aromatic hydrocarbon solvent and it stays suspended without coalescence or agglomeration, then this is an indication that the resin is insoluble, while if the resin becomes coalesced or agglomerated, then this is an indication that the resin is not insoluble. There is dispute, however, over how long the resin must remain suspended without coalescence or agglomeration to come within the defining words of the patent claim: "substantially insoluble in aromatic hydrocarbon solvents."

At the original trial in 1959 before Judge Goodman, the Court considered only tests in pure toluene in determining whether the resin was substantially insoluble in an aromatic hydrocarbon solvent. Furthermore, at the original trial, the lapse of time between the date when the resin was placed in toluene and the date when the observations of the condition of the resin in the toluene were made, was less than one week.

Switzer demonstrated during this contempt hearing that its test resin remained free flowing and dispersed 24 hours after being placed in the pure solvents. Switzer also demonstrated at the trial that the resin placed in the solvents on September 25, 1965, which had stood unshaken for 17 days, was free-flowing upon being shaken at the trial.

Radiant also made a number of test resins and conducted tests thereon in the pure solvents. One resin made by Radiant, designated JS-739, contained the following ingredients in the indicated mole proportions: 7 moles of formaldehyde, 4 moles of sulfonamide, 1 mole of melamine and one-half mole of urea. Another resin manufactured by Radiant, designated JS-738, contained the same ingredients except the urea.

At the trial, Bennahmias, Technical Director of Radiant, testified (RT 404 et seq.) that on July 13, 1963, more

than two years prior to trial, he placed a JS-738 resin in a container of benzene (Radiant's Exhibit No. 43) and that on July 28, 1963, he placed a JS-738 resin in a container of toluene (Radiant's Exhibit No. 44). Mr. Bennahmias then testified about the results of these 1963 tests. However, because these tests were not conducted under the observation of Switzer, as were later tests conducted by Radiant on September 3, 1965, and in light of the conflict in results between these tests and those conducted on September 3, 1965, the Court considers the latter tests more reliable.

In the inter-parties test in Richmond, California, held on September 3, 1965, Bennahmias testified that he placed a measured quantity of the JS-738 resin in containers of benzene (Radiant's Exhibit No. 17), toluene (Radiant's Exhibit No. 18) and xylene (Radiant's Exhibit No. 19).

The JS-738 resin, which was placed in benzene on September 3, 1965 (Radiant's Exhibit No. 17) was introduced in evidence by Radiant and appeared to be agglomerated at the time of trial. But the JS-738 resin, which was placed in the toluene on September 3, 1965, (Radiant's Exhibit No. 18) was free flowing—notwithstanding Mr. Bennahmias' statement that he thought it was partly agglomerated (RT 418). Further, the JS-738 resin, which was placed in xylene on September 3, 1965, (Radiant's Exhibit No. 19) was also free-flowing at the time of trial.

Radiant relies greatly upon the test which showed that on the date of trial, the JS-738 resin, which had been placed in *benzene* on September 3, 1965, appeared to be agglomerated.

However, all resins of this type will eventually agglomerate in any pure aromatic hydrocarbon solvent. The stronger the solvent the less time it will take to ag-

glomerate. According to the testimony of Dr. Von Fischer, and certain publications introduced at trial (RT 220-225), benzene has a very high solvent power, is the most volatile of the aromatic hydrocarbon solvents, is quite toxic and is not generally employed as a solvent in paint vehicles of the type herein used. Since benzene is the strongest of the three aromatic hydrocarbon solvents, a resin should agglomerate in it first.

Further, the testing of a resin in any pure aromatic hydrocarbon solvent is merely an indication of the substantial insolubility of the resin in a paint vehicle.

The mere fact that resin agglomerates within four or more weeks in a pure hydrocarbon solvent, such as benzene, does not necessarily indicate that the resin will agglomerate in a paint vehicle in the same period of time. Pure hydrocarbon solvents are never used alone with resin in a paint vehicle, but only in conjunction with other liquids and substances which in effect reduce the strength of the pure solvent.

Thus, in a paint vehicle the resin will actually remain insoluble for a considerably longer period of time than in a pure solvent.

As demonstrated at trial by Switzer, resins made up in accordance with the examples in the Kazenas patent have remained free-flowing and dispersable in the paint vehicles for longer than five years (RT 102-113).

Mr. Bennahmias, testifying for Radiant, admitted at trial that tests of 48 hours and one week are indications that the pigment can be used satisfactorily in paint vehicles (RT 483)—although Radiant used other tests as well (RT 491).

The Court finds, therefore, that the benzene test conducted by Radiant, showing its JS-738 resin to have agglomerated in benzene after approximately seven weeks,

does not disprove that the accused resin contains sufficient melamine to render it substantially insoluble in aromatic hydrocarbon solvents.

The Court finds no merit in Radiant's contention that the results are not reliable because of certain differences between the kind of melamine Switzer used in its qualitative tests and that used by Radiant, and because of certain differences in the method of preparation of the test resin by Switzer.

It is, therefore, the finding of the Court that, when taken together, the 24 hour and 17 day qualitative tests conducted by Switzer, and the qualitative tests conducted by Radiant which showed that their JS-738 resin was free flowing and dispersed in toluene and xylene after approximately seven weeks, are simple clear reliable tests, which demonstrate that, in fact, the accused 4-C resin contains sufficient melamine to render it substantially insoluble in aromatic hydrocarbon solvents.

The Court, however, in no wise suggests that the above tests represent the minimum standard for determining the question presented or that the 24 hour qualitative test, alone, would not suffice for determining the question here. The Court merely holds that the above tests when considered together do in fact show beyond any doubt that the accused 4-C resin contains sufficient melamine to render it substantially insoluble in aromatic hydrocarbon solvents.

In addition to the above qualitative tests made by Switzer, Switzer also made a 24 hour quantitative test. In this test a carefully measured portion (.10 grams) of the JS-738 resin (which was a sample resin made by Radiant but without any urea) was deposited in 50 milliliters of each of the three pure solvents. In addition, a carefully measured portion of the JS-739 resin (also a sample made by Radiant but containing a half-mole of

urea) was deposited in 50 milliliters of each of the three pure solvents.

After allowing all of these solutions to stand for 24 hours, Switzer determined how much of the resin had gone into solution, i.e., the solubility. Switzer determined that in benzene, .020 grams of the JS-738 resin had dissolved per 100 milliliters of benzene, while .010 grams of the JS-739 resin had dissolved per 100 milliliters of benzene. In tuolene, Switzer determined that .007 grams of the JS-738 resin had dissolved per 100 milliliters of tuolene, while .002 grams of the JS-739 resin had dissolved per 100 milliliters of toluene. In xylene, Switzer determined that .003 grams of the JS-738 resin had dissolved per 100 milliliters of xylene, while .002 grams of the JS-739 resin had dissolved per 100 milliliters of xylene.

It appears, therefore, that in the 24 hour period only very minute quantities of the JS-738 resin and of the JS-739 resin went into solution.

Although these quantitative tests were not before the Court in the original infringement trial in 1959, the Court finds that the results of the quantitative tests with the JS-738 resin substantiate the findings of this Court with regard to the qualitative tests, to wit: that the accused 4-C resin contains sufficient melamine to render it substantially insoluble in aromatic hydrocarbon solvents.

Radiant's basic contention has been that the amount of melamine alone in the condensation product of formaldehyde, sulfonamide and melamine is insufficient to render the product substantially insoluble in aromatic hydrocarbon solvents and that its "4-C resins are rendered substantially insoluble in aromatic hydrocarbon solvents by using urea in addition to melamine, the urea being an essential ingredient without which the condensation product will agglomerate." *Radiant's Pre-Trial Brief*, p. 4.

The Court has already found that the amount of melamine by itself in the accused 4-C resin is sufficient to render it substantially insoluble in aromatic hydrocarbon solvents.

Tending to further confirm this finding is the fact that the record before us indicates that, not only is the amount of melamine sufficient to render the condensation product substantially insoluble in aromatic hydrocarbon solvents, but also that the additional urea, itself, has little or no effect in producing such substantial insolubility.

The Court recognizes that the question whether the urea produces or tends to produce the substantial insolubility of the accused 4-C resin in the aromatic hydrocarbon solvents is *not* the determinative issue referred to this Court by the Court of Appeals.

Radiant, therefore, is under no obligation to demonstrate that it is the urea which produces the substantial insolubility of its 4-C resin in the aromatic hydrocarbon solvents. Rather, the burden of proof is upon Switzer to prove that, whatever the effect of the urea may be, the amount of melamine, alone, in the accused 4-C resin is sufficient to render it substantially insoluble in the aromatic hydrocarbon solvents.

Nevertheless, evidence tending to show that the urea has no effect, so far as the 4-C resins are rendered substantially insoluble in aromatic hydrocarbon solvents is concerned, tends to confirm the Court's finding that it is the melamine, alone, which renders the accused 4-C resin substantially insoluble in the aromatic hydrocarbon solvents.

In this connection, the record shows that, although Radiant introduced in evidence the containers of benzene, toluene and xylene with the JS-738 resin (without urea), it did not introduce in evidence the containers of benzene,

toluene and xylene which had the JS-739 resin (with urea) deposited in them on September 3, 1965, at the interparties test at Richmond, California.

It then became necessary for Switzer to introduce in evidence the container of benzene with the JS-739 resin (with urea). The Court examined this container of benzene with the JS-739 resin (with urea) and it appeared that this JS-739 resin (with urea) was in the same agglomerated condition as the JS-738 resin (without urea) and Bennahmias so admitted (RT 472).

If, as contended by Radiant, that its "4-C resins are rendered substantially insoluble in aromatic hydrocarbon solvents by using urea in addition to melamine", then it would seem that the agglomeration of the JS-739 resin (with urea) in benzene after approximately seven weeks demonstrates that the addition of urea had no apparent effect on the 4-C resin.

Our conclusion is that (1) either Radiant's contention that its "4-C resins are rendered substantially insoluble in aromatic hydrocarbon solvents by using urea in addition to melamine" is wrong or (2) the benzene tests which showed that after seven weeks the JS-738 resin (without urea) and the JS-739 resin (with urea) had agglomerated do not disprove that either resin is substantially insoluble in aromatic hydrocarbon solvents.

The Court has already found that the benzene test conducted by Radiant, showing its JS-738 resin to have agglomerated in benzene after approximately seven weeks, does not disprove that the accused resin contains sufficient melamine to render it substantially insoluble in aromatic hydrocarbon solvents.

After a review of the entire record, as discussed in this opinion, the Court finds, in answer to the question presented here, that in the 4-C resin, the amount of melamine

utilized is such as to bring the resin within the limits of the claims of the Kazenas patent as those claims are delineated in *Locklin v. Switzer Bros., Inc.*, 299 F.2d 160 (9th Cir. 1961).

This Memorandum of Decision contains the Findings of Fact and Conclusions of Law as required by Fed. R. Civ. P. 52.

Dated: February 17, 1966.

W. T. Sweigert
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VASE CALVIN VALRIE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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FILED
JUL 11 1966
WM. B. LUCK, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VASE CALVIN VALRIE,

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vs.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VASE CALVIN VALRIE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, Vase Calvin Valrie and co-defendant Thomas Winfrey were indicted by the Federal Grand Jury on April 13, 1961, for the Southern District of California, Central Division and charged with violation of Title 21, United States Code, Section 174 [C. T. 2]. 1/ The Indictment is in four counts. Appellant is charged in the four counts of the Indictment and co-defendant Winfrey is charged in Counts Three and Four only.

Count One charges that on or about January 12, 1961, in Los Angeles County, appellant knowingly and unlawfully sold and

1/ "C. T." refers to Clerk's Transcript of Record.

facilitated the sale to William Green, of 42 grams of heroin, a narcotic drug, which, as the appellant then and there well knew had been imported into the United States of America contrary to Title 21, United States Code, Section 173.

Count Two relates the same date and quantity of heroin in Count One and charges that appellant knowingly and unlawfully received, concealed and facilitated the concealment and transportation of said heroin.

Count Three charges that on or about January 25, 1961, in Los Angeles County appellant and co-defendant Winfrey knowingly and unlawfully sold and facilitated the sale to William Green, of 56.860 grams of heroin, a narcotic drug, which as appellant and co-defendant then and there well knew, had been imported into the United States of America contrary to Title 21, United States Code, Section 173.

Count Four relates to the same date and quantity of heroin as in Count Three and charges that appellant and co-defendant Winfrey knowingly and unlawfully received, concealed and facilitated the concealment and transportation of said heroin.

On April 17, 1961, appellant was arraigned in Case No. 29673-CD before the Honorable Harry Westover, United States District Court Judge [C. T. 6]. On May 15, 1961, appellant again appeared before Judge Westover and entered a plea of not guilty to the four counts of the Indictment. Appellant was represented by counsel, Mr. Harvey Byron, at this time [C. T. 9].

On September 5, 1961, Case No. 29673-CD was called for

trial before the Honorable William C. Mathes, United States District Court Judge. At this time a jury waiver was signed by all parties in this case and filed with the Court [C. T. 19]. A written stipulation was entered into by all parties to this case "that William Green, a percipient witness to certain events alleged in the Indictment in the said cause, is unavailable to testify at the trial of the said cause for the reason that he is dead." [R. T. 6]. 2/

On September 6, 1961, the Court found appellant guilty as charged in Counts One and Two of the Indictment and not guilty as to Counts Three and Four. The Court acquitted co-defendant Winfrey as to Counts Three and Four of the Indictment [C. T. 23; R. T. 22].

An Information regarding appellant's prior conviction was filed with the Court on September 6, 1961 [C. T. 21; R. T. 23]. On the same date, the Court sentenced appellant to the custody of the Attorney General or his authorized representative for a period of 20 years for the offense charged in Count One of the Indictment, and for a like period of 20 years for the offense charged in Count Two of the Indictment [R. T. 41]. It was further adjudged that the sentence imposed in Counts One and Two shall commence and run concurrently [R. T. 42].

On September 12, 1961, a timely notice of appeal was filed by appellant [C. T. 24].

2/ "R. T. " refers to Reporter's Transcript.

The offenses occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291, 1294.

II

STATUTES INVOLVED

Section 174 of Title 21, United States Code, provides in pertinent part that:

"Whoever . . . knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any . . . narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense, . . . , the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this

section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. "

III

STATEMENT OF THE FACTS

In December 1960, Federal Bureau of Narcotics agents arrested one William Green in San Francisco, California. Subsequently Mr. Green agreed to work as an undercover aide to make buys of heroin for the Federal Bureau of Narcotics [R. T. 14, 15].

On January 10, 1961, Agent Robert Nickoloff of the Federal Bureau of Narcotics came to Los Angeles, California for the express purpose of "purchasing evidence from various defendants". At about midnight on January 10, 1961, Agent Nickoloff met with Mr. Green at the intersection of La Brea and Washington Streets in Los Angeles, California, a prearranged location [R. T. 15, 57]. Agent Nickoloff and Mr. Green proceeded to the Royal Hawaiian Motel at 1632 La Brea, Los Angeles, California, where room No. 11 was rented for Mr. Green. Agent Nickoloff and Agents George E. Olsen and John Warner, California State Narcotics Officers, rented rooms No. 1 and 2 so as to maintain surveillance of room No. 11 [R. T. 17, 58, 148, 169].

At about 4:00 A. M. on January 11, 1961, Mr. Green was

observed to leave the motel room and return at about 8:30 A. M. Mr. Green again left about noon and returned about 6:00 P. M. and again at about 6:30 P. M. returning at about 7:30 P. M. [R. T. 18].

At approximately 7:40 P. M. on January 11, 1961, Mr. Green placed a call from a public phone booth, at the request of Agent Olsen, to the appellant by dialing PL 8-8515. This telephone conversation was monitored by Agent Olsen with a twin-phone, a small device placed on the ear piece of the telephone with a hearing piece extending from it [R. T. 18, 19, 60, 91, 92, 95].

Agent Olsen testified that he recognized the voice of the receiver of the call as that of the appellant and that the party identified himself as "Val" and that "he (Val) was waiting for Alvin Green" and that "he would be by in about an hour" [R. T. 93, 94, 97].

At about 10:45 P. M. and again at about 12:15 A. M. Mr. Green called the same number and these conversations were also monitored by use of the twin-phone device [R. T. 17, 61, 97].

Agent Nickoloff testified that when the 12:15 A. M. phone call was placed Mr. Green said, "is Val there?" and the person on the other end said "no, he is already on his way over there. He's met the man and has the stuff." [R. T. 22].

Room No. 11 was then searched by Agents Nickoloff and Olsen. Mr. Green was searched by Agent Nickoloff with the result that narcotics were not found in the room or on the person of Mr. Green [R. T. 66]. The sum of \$500.00 was placed in Mr. Green's suitcase for his use in the purchase of heroin [R. T. 23, 140].



At about 12:45 A. M. on January 12, 1961, appellant arrived driving a 1960 Chevrolet with California License No. ULJ 587 [R. T. 26, 34, 61].

The agents thereafter met with Mr. Green and ascertained that he still had the \$500.00 [R. T. 26, 34, 62]. A fargo transmitter which had been placed in room No. 11 was adjusted by Agent Nickoloff to make it operative [R. T. 26].

Appellant returned at approximately 2:20 A. M. driving the same vehicle. By means of the fargo transmitter, appellant was overheard to say that "the man . . . has 4 pieces and has to cut it up. It won't be ready until morning." [R. T. 38]. Appellant left at approximately 2:30 A. M. [R. T. 37, 69].

At about 7:30 A. M. on January 12, 1961, Mr. Green placed a call to appellant at PL 8-8515. Agent Olsen monitored this conversation by means of the twin-phone device and he testified that he recognized the voice of the person answering the telephone call as that of the appellant and that appellant said, "sit tight, I'll bring the stuff by in about 45 minutes" [R. T. 39, 99, 100]. Mr. Green and room No. 11 were searched at this time by the agents with the result that narcotics were not found in the room or on the person of Mr. Green. Mr. Green was again furnished with \$500.00 [R. T. 40].

At about 11:40 A. M., on January 12, 1961, appellant was observed arriving driving the same vehicle and entering room No. 11 and leaving about 5 minutes later. In about 2 minutes thereafter, Mr. Green handed Agent Nickoloff a rubber contraceptive containing

approximately 42 grams of heroin and entered in evidence as Government's Exhibit 2B. Agents Nickoloff and Olsen then searched Mr. Green and room No. 11 and did not find the \$500.00 [R. T. 9, 41, 42, 43, 70].

Agent Aubrey Roumo, Federal Bureau of Narcotics Agent, followed appellant after he left room No. 11 to a service station at 27th and Western Avenue, where appellant displayed a large roll of money [R. T. 193].

IV

ERRORS SPECIFIED BY APPELLANT

Appellant has specified the following points on appeal:

1. The introduction of evidence relating to the phone conversations between appellant and William Green violated the prohibition of Title 47, United States Code, Section 605.
2. The interception of the contents of the phone conversation between appellant and William Green constituted an unreasonable search and seizure as applied to appellant and violated the provision of the Fourth and Fifth Amendments to the United States Constitution.
3. The evidence is insufficient to establish that certainty of possession necessary to support the statutory presumption of unlawful importation.
4. The consideration of evidence of the statutory presumption of unlawful importation denied appellant due process of

law under the Fifth Amendment.

V

ARGUMENT

A. TESTIMONY RELATING THE TELEPHONE CONVERSATIONS BETWEEN APPELLANT AND WILLIAM GREEN WAS PROPERLY ADMITTED.

The admission into evidence of the telephone conversations between appellant and William Green does not violate Title 47, United States Code, Section 605, as appellant claims, since the consent of Mr. Green had been obtained.

McClure v. United States, 332 F.2d 19

(9 Cir. 1964), cert. den. 380 U.S. 945.

Agents Nickoloff and Olsen testified to the conversations which they overheard by the use of a twin-phone device. The cases are in accord that testimony as to telephone conversations obtained by the use of a twin-phone device with the consent of only one of the parties to the conversations, does not constitute an "interception" within the meaning of Section 605 of Title 47, United States Code, and does not constitute an unreasonable search and seizure and thus is not violative of the United States Constitution.

Wilson v. United States, 316 F.2d 212 (9 Cir. 1963);

Williams v. United States, 290 F.2d 451

(9 Cir. 1961);

(9 Cir. 1956).

Both parties to a phone conversation are alternately senders and receivers, and thus either party may supply the requisite consent.

Rathbun v. United States, 355 U.S. 107,

reh. den. 355 U.S. 925.

The trial record in the present case supports the fact that Mr. Green had voluntarily consented to the monitoring of the conversations by the agents.

1. Mr. Green himself placed the call to appellant at the request of the agents.
2. The calls were placed at a public phone booth.
3. The twin-phone device employed is such that it could not have been used without Mr. Green's awareness.
4. Mr. Green had agreed to work as an undercover aide for the Federal Bureau of Narcotics.

Appellant argues that the fact that Mr. Green had been arrested prior to giving consent and the fact that he was "instructed" to make the calls in question, establishes that he did not in fact consent. This contention is without merit since there is no showing in the record that there was any unwillingness or refusal on the part of Mr. Green. In fact the record upholds the contention that he



readily complied with each request of the agents. Additionally there is no case authority for the proposition that the Government in this situation is required to carry the burden of showing the voluntariness of the consent.

Appellant relies on Weiss v. United States, 308 U.S. 321 for his contention that Mr. Green's consent was not voluntarily given. However, the Weiss case is distinguishable from the case at hand. In the Weiss case, at the time the communications were overheard, all participants were ignorant of the interception and there had been no consent until after the calls had been placed and they had been informed of the "interception".

Therefore, the agent's testimony as to the telephone conversations between appellant and the undercover aide, overheard by use of a twin-phone device with the consent of the aide, was admissible and does not constitute an unreasonable search and seizure.

United States v. Pierce, 124 F. Supp. 264 (1954),
aff'd. 224 F.2d 281.

**B. THE EVIDENCE OFFERED BY THE
GOVERNMENT WAS SUFFICIENT TO
SUSTAIN THE CONVICTION.**

In a criminal case evidence upon appeal is viewed in the light most favorable to the Government.

Hiram v. United States, 354 F.2d 4, 7 (9 Cir.1965);

Stein v. United States, 337 F.2d 14, 16

(9 Cir. 1964);

Mosco v. United States, 321 F.2d 180, 181

(9 Cir. 1963), cert. den. 371 U.S. 842.

This rule also includes all inferences to be drawn from the evidence.

Yeargain v. United States, 314 F.2d 881, 882

(9 Cir. 1963).

The summary of the evidence offered by the Government and believed by the Court in the present case clearly establishes that appellant did sell 42 grams of heroin to the undercover assistant [9, 41-43, 70].

The circumstantial evidence which establishes the appellant's possession of the heroin is as follows:

(1) Mr. Green, the undercover aidé was in contact with appellant by phone and in person [R. T. 93, 94, 97].

(2) During the contacts arrangements were made for appellant to sell approximately 2 ounces of heroin to Mr. Green for \$500 [R. T. 41-43, 70].

(3) On January 12, 1966, at about 2:15 A.M. in room No. 11 there was a conversation where appellant told Mr. Green that he could not deliver until morning since the "stuff was being cut" [R. T. 38, 39, 99, 100].

(4) Appellant was physically present at the scene of the transaction [R. T. 24, 37, 38, 69].

(5) When the agents knew that appellant was on his way to deliver, they searched room No. 11 and Mr. Green and did not find any narcotics [R. T. 40].

(6) Appellant arrived at about 11:40 A. M. on January 12, 1961, and left at about 11:45 A. M. [R. T. 41, 70].

(7) About two minutes thereafter, Mr. Green handed a rubber contraceptive containing 42 grams of heroin to Agent Nickoloff [R. T. 9, 42, 43, 70].

(8) Appellant was followed to a gas station where he was seen displaying a large roll of money [R. T. 193].

(9) Mr. Green and room No. 11 were searched and the \$500 previously left with Mr. Green by the agent for his use in the purchase of heroin was not found [R. T. 42].

Appellant knowingly and willfully participated in the illicit sale and distribution of the heroin, since appellant indicated that he would bring the "stuff" or heroin by and appellant employed the jargon of the narcotics trade when he told Mr. Green that the "man has four pieces" and the "stuff" was being "cut" [R. T. 38, 39, 99, 100]. In addition, subsequent to the January 12, 1961 sale, another meeting took place on January 25, 1961, between Mr. Green and appellant. At this time there were telephone conversations between Mr. Green and appellant arranging the sale of two ounces of heroin

for \$500.00 further indicating appellant's ready compliance and willingness to engage in the illicit narcotics traffic [R. T. 134-138].

C. THE EVIDENCE WAS SUFFICIENT TO
ESTABLISH APPELLANT'S POSSESSION
OF THE HEROIN.

Possession may be either actual or constructive, and proof of dominion and control over narcotics sufficient to establish possession thereof may be by use of either circumstantial or direct evidence.

Rodella v. United States, 286 F.2d 306

(9 Cir. 1960).

In the instant case, due to the fact that Mr. Green was dead at the time of trial, the Government relied primarily upon circumstantial evidence to prove its case against appellant.

In view of the overwhelming circumstantial evidence as is set out in Section B above, it is respectfully submitted that this evidence was sufficient to establish that appellant did have possession of the heroin.

United States v. Malfi, 264 F.2d 147 (2 Cir. 1959),

cert. den. 361 U.S. 817.

The fact of such possession, unless satisfactorily explained, raises the inferences that the heroin was brought or imported into the United States of America contrary to law and that appellant had knowledge that the narcotic drug was imported or brought in contrary

to law. These statutory presumptions have been unequivocally upheld.

Anthony v. United States, 331 F.2d 687

(9 Cir. 1964);

Brothers v. United States, 328 F.2d 151

(9 Cir. 1964);

Medrano v. United States, 315 F.2d 361

(9 Cir. 1963);

Cellino v. United States, 276 F.2d 941

(9 Cir. 1960).

This Court is required to regard all evidence and all inferences that might be drawn therefrom most favorable in support of the judgment of the trial court.

Rios v. United States, 283 F.2d 134

(9 Cir. 1960).

CONCLUSION

For the reasons stated above it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez
GABRIEL A. GUTIERREZ

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES EARL BRUBAKER,

Appellant,

vs.

No. 17,583

FRED R. DICKSON, Warden
of the California State
Prison at San Quentin,
California,

Appellee.

*Accepted
Apr. 3/62*

APPELLEE'S BRIEF

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Appellee.

APPELLEE'S BRIEF

STATEMENT OF CASE

Due to the unusual manner in which this case has come to this Court and due also to the lengthy earlier proceedings in both the state and federal courts, which have been had in this matter, the appellee deems it advisable to set out in full a historical statement of the various proceedings which have transpired earlier in this case so that the Court may have the advantage of having before it the full extent of the present matter.

The petitioner, Charles Earl Brubaker, is presently incarcerated in the California State Prison at San Quentin, California, under two sentences of death imposed against him by the Superior Court of the County of Los Angeles on

December 30, 1958. Appellant's two death penalty convictions were affirmed on automatic appeal by the Supreme Court of the State of California (People v. Brubaker, 53 Cal.2d 37, 346 P. 2d 8) and certiorari in that case was denied by the United States Supreme Court.

Subsequent petitions for writs of habeas corpus were denied by the Superior Court of Marin County on July 29, 1960, and by the Supreme Court of the State of California on August 1, 1960, and certiorari from these cases was denied again by the United States Supreme Court on February 20, 1961 (Brubaker v. Dickson, No. 506 Misc., OT 1960).

After the denial of these various petitions, Brubaker's execution date was set for May 16, 1961, and on May 3, 1961, a petition for habeas corpus was filed in the United States District Court for the Northern District of California, Southern Division (U.S.D.C. #39908). Due to the proximity of the execution date, a hearing on the petition was held before the Honorable George E. Harris, U.S. District Judge, on May 11, 1961, although no order to show cause had been issued by the court nor had a return to the writ been filed by the State of California. At the time of said hearing, lengthy arguments were presented to the Court, and at the conclusion thereof the Court denied the petition, denied the requested stay of execution and granted to the petitioner a certificate of probable cause.

The following day, May 12, 1961, the petitioner's request for a stay of execution was argued before this Honorable Court (USCA #17365). For reasons with which this Court is familiar, at the conclusion of the argument on May 12, the petitioner filed a motion withdrawing his notice of appeal from U.S.D.C. #39908, and this Court then proceeded as if the petitioner had filed an original application with the court for a writ of habeas corpus. This Court declined to entertain such application and transferred it to the United States District Court for the Northern District of California, Southern Division, "for the hearing and determination of said application". (See order dated May 12, 1961, in U.S.C.A. #17365.)

An order to show cause was issued by the District Court on May 12, 1961, and the case which had borne the number 17365 in this Court became number 39920 in the District Court.

On May 16, 1961, the State of California filed a return to the order to show cause issued by the District Court, and on May 31, 1961, petitioner filed his traverse to the return. The case was originally calendared for hearing in the United States District Court on May 15, 1961, but at that time it was continued for hearing until June 1, 1961. On the last mentioned date, a hearing was held and at the conclusion thereof the matter was continued for further hearing until June 29, 1961.

On June 29th, after the conclusion of the hearing, the United States District Court, the Honorable George E. Harris, Judge Presiding, dismissed the petition for the writ and denied petitioner a certificate of probable cause. A formal order reflecting the District Court's decision was signed by the Court on June 30th, and was filed by the clerk on July 3, 1961.

On or about August 2, 1961, the petitioner Brubaker filed a number of documents with this Court. Said documents purport to be notices of appeal, requests for preparation of the record, and requests for certificates of probable cause in both USDC Nos. 39908 and 39920. On or about August 10, 1961, the appellant withdrew his appeal in USDC 39908.

On Friday, August 11, 1961, the appellant's petition for certificate of probable cause to this Court was heard by the Court (In re the application of Brubaker, No. 1261, Misc.), and later that same day the appellant's application for certificate of probable cause and for stay of execution was denied.

Subsequently, on or about August 21st, appellant made a similar application to the Honorable William O. Douglas, Associate Justice, United States Supreme Court, and on September 7, 1961, Mr. Justice Douglas granted to the appellant a certificate of probable cause and an order staying his execution.

It is pursuant to these latter orders that the present

appeal comes before this Court.

STATEMENT OF FACTS

The appellant raises no issue in this case as to his guilt of the two murders which he committed, and the facts of his crimes will not, therefore, be detailed in this brief. (For a complete statement thereof, see People v. Brubaker, 44 Cal.2d 37, 346 P.2d 8.) Suffice to say that the murders took place during the evening of Sunday, July 20, 1958, and the bodies of Mrs. Morey and her son, Craig, were discovered the following Tuesday, July 22, 1958 (RT 45, 49-51). ("R.T." refers to the Reporter's Transcript of the state court trial which was lodged with the United States District Court.)

The appellant Brubaker was arrested by the Los Angeles police for these two murders about 7:30 p.m. on July 22, 1958 (RT 93-94). When questioned about the crimes at the time of his arrest, he admitted seeing Mrs. Morey on Sunday evening, but he insisted both she and her son were alive when he last saw them (RT 96, 110). In spite of his protestations of innocence, however, appellant was arrested. Brubaker spent the night at the Wilshire District Police Station, and then the next morning, July 23rd, he was taken by the police to the Police Administration Building in downtown Los Angeles (RT 111-112). Several hours later, he confessed to the two murders and a signed statement was taken from him (RT 99-107).

The next day, July 24th, the appellant repeated his

confession, and this time the confession was recorded on a tape recorder (RT 133-134, 135-163). During the trial of the appellant in 1958, this tape recording was played to the jury (RT 134).

In the course of both of these confessions, the appellant made reference to his fair treatment by the police after his arrest (RT 106, 163), and he also explained that he was confessing in order to get everything straight (RT 136, 153).

At the time of trial, the appellant offered no objection to the introduction of either of these two confessions (RT 102, 134), nor did he even attempt to suggest that they were anything but completely free and voluntary. As a matter of fact, in his argument to the jury during the guilt or innocence phase of appellant's trial, his attorney, in discussing appellant's failure to testify in his own behalf (a procedure, it should be noted, to which the appellant specifically assented in open court at the time of trial (RT 167)), stated that Brubaker had chosen not to testify, because the jury, in hearing the policeman's account of Brubaker's statement to him, had already heard all that Brubaker had to say about the crime (RT 198).

The foregoing constitutes the facts of this case insofar as they appear as a matter of record in the case.

Beginning, however, at page 7 of his brief, the

appellant commences a long recitation of what he alleges to be the real facts surrounding his apprehension by the Los Angeles Police Department, his detention by that agency, his questioning by the officers, and the circumstances under which his confessions were taken and his trial was conducted. It is extremely important to note that this alleged "statement of facts" consists almost entirely of information presented in affidavit form by the appellant, and these alleged facts did not form any part of the evidence or proceedings presented to the trial court or jury. All of this information was presented to the district court judge in affidavit form and was not contained in the transcripts of the state court trial which were considered by him under the ruling of Brown v. Allen, 344 U.S. 443, 503, 73 S.Ct. 397.

Basically, the appellant's so-called facts, if believed, allege that when he was arrested he requested the services of an attorney, but that he was denied this request on four separate occasions, and that he subsequently decided he had to confess due to his fear of physical abuse by the officers and also due to his fear that until he confessed he would not be allowed to consult with an attorney. He does not allege, however, he was beaten or physically threatened by the officers.

He explains that none of this information was presented to the trial court and jury due to the failure of his

attorney to present such testimony even though he (Brubaker) had told his attorney of these alleged facts (AOB 13).

APPELLANT'S CONTENTIONS

1. The appellant contends that the two confessions admitted into evidence against him during his murder trial were obtained from him in violation of his right to constitutional due process under the Fourteenth Amendment.

2. The appellant further contends that he was denied his constitutional right to the effective aid of counsel during his murder trial in the state court.

3. The appellant further contends the United States District Court committed prejudicial error in denying his petition for a writ of habeas corpus and is basing that denial on a review of the state court trial transcript.

4. The appellant further contends that the proceedings in the District Court were so infected with procedural error and confusion as to prevent a fair consideration of his petition for the writ of habeas corpus.

SUMMARY OF APPELLEE'S ARGUMENT

I. Having failed to object to the admissibility of his confessions at the time of trial, the appellant is now precluded from raising this point on a habeas corpus proceeding in this Court.

II. The District Court properly found that the representation afforded to appellant in his state court trial was adequate and competent.

III. The Appellant's petition was fully and fairly considered by the District Court and no procedural error occurred therein.

ARGUMENT

I

HAVING FAILED TO OBJECT TO THE ADMISSIBILITY OF HIS CONFESSIONS AT THE TIME OF TRIAL, THE APPELLANT IS NOW PRECLUDED FROM RAISING THIS POINT ON A HABEAS CORPUS PROCEEDING IN THIS COURT

The appellant's first argument on this appeal involves his contention that during his incarceration by the Los Angeles Police Department and prior to the making of his confessions, the police officers denied him the right to consult with an attorney and also failed to advise him of his further right to remain silent during the interrogation. These denials, he alleges, constituted a denial of his rights to due process of the law under the Fourteenth Amendment to the United States Constitution, and rendered his confessions inadmissible.

The appellee's answer to these allegations is simply that the appellant knew of the alleged facts surrounding the taking of his confessions at the time of trial, and yet he not only did not present them to the trial court at that time, he did not even object to the admission of the two confessions into evidence. Since he was represented by counsel before and during the said trial, he has, therefore, waived any question as to their admissibility, and he cannot present the matter at this time to a federal court in a habeas corpus proceedings

since he is bound by his counsel's actions (Eury v. Huff, 141 F.2d 554, 555 (4th Cir. 1944)). It has always been the contention of the State of California throughout these proceedings that since the appellant failed to object to the admissibility of these confessions at the time of trial, he had waived the point (Burall v. Johnson, 134 F.2d 614 (9th Cir. 1943)); and the only possible manner in which this point could ever be collaterally raised was by attacking the competency of the representation of counsel given to appellant at the time of trial.

In other words, although the appellant has apparently chosen to largely rest this appeal on the question of whether or not his constitutional rights were violated at the time of his arrest and interrogation by the police, the appellee submits that this is an issue which cannot be presented by him at this time due to his having waived the matter by failing to raise it in the trial court. Appellee submits that the only appealable issue before this Court is the question of the competency of appellant's trial counsel, and that this issue lacks substantive merit.

Interestingly enough, counsel for appellant apparently originally concurred in this view, because in his opening remarks made to Judge Harris in the district court at the first hearing in this case on May 11, 1961, his attack was largely directed toward the competency of appellant's trial counsel



1/
(RT I, pp. 2-5, 10, and Judge Harris felt likewise (RT I, p. 38)), and the case was eventually decided on the basis (RT III, pp. 20, 31-32, 38-39).

Appellant now, however, chooses to rest his appeal primarily on the grounds that he was entitled to reopen the question of the voluntariness of Brubaker's confessions in the hearings before the United States District Court. It is respectfully submitted that this position was and is erroneous, and that the appellant's case rests on an untenable major premise.

It is the appellee's contention that the sole question to be considered in this case, therefore, is the competency of Brubaker's trial counsel and the representation afforded to Brubaker during his superior court trial by that counsel. And this question can and should be answered by a consideration of the trial court record by the United States District Court. (Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397.) This, of course, is precisely what was done in this case. By reading the trial court record, the District Court could determine if the representation afforded to Brubaker by his trial counsel amounted

1/ There were three hearings held before the U.S. District Court in this case - May 11th, June 1st, and June 29, 1961. The transcripts of these hearings are part of the record before this Court, and for ease of reference will be referred to as RT I, RT II, and RT III respectively.

to a farce or sham or token appearance within the meaning of the well-defined rule as set out in Powell v. Alabama, 257 U.S. 45, 77 L.Ed. 158; People v. Chessner, 29 Cal.2d 515, 175 P.2d 761; People v. Wien, 50 Cal.2d 383, 326 P.2d 457. And the comments of the District Court made during the hearing held before him clearly indicate he felt that Brubaker had received adequate and competent representation and that he decided the case on that basis (RT III, pp. 31-32, 38-39).

The appellant has placed great reliance in this appeal on the recent decision by this Court in the case of Griffith v. Rhay, 282 F.2d 711, but it is respectfully submitted that that decision would be inapplicable to this appeal even if the issue of the voluntariness of the confessions were properly before the Court.

In view of the fact of the recent date of that decision and the further fact it was decided by this Court, appellee will not repeat all of the facts of that case in this brief; we will, however, point out why that case is not authoritative here. In the first place, Griffith had, at the time of his trial, raised the question of the voluntariness of his confession, although he had not done so on the same grounds as he urged to this Court (cf. Griffith v. Rhay, 177 F. Supp. 386). The importance of this fact can be seen when it is realized that in deciding the Griffith case, this Court had before it the admitted facts of how Griffith's

statement had been taken and the circumstances thereof.

Contrast that situation with the one which is presented here. Brubaker, although fully aware of the alleged refusal by the police to allow him to consult with counsel, not only failed to raise the matter in the trial court, but even consented to the admission into evidence of the two confessions. It is difficult to conceive of a more classic example of waiver on his part.

Brubaker attempts to avoid the effects of this situation by claiming that he told his counsel of this matter, but the attorney took no action thereon. Besides proving rather conclusively that this is a competency of counsel case as has been continually contended by the appellee all along, this argument also tends to belie the appellant's excuse that he failed to take any action in the matter because he failed to understand its importance. If he thought it was important enough to tell his attorney, it is certainly indicative that he appreciated its import, and his failure to mention the matter to the trial court becomes more impressive as showing a binding waiver. Moreover, the decision of his trial counsel not to contest the admissibility of the confessions is certainly binding on Brubaker (Eury v. Huff, 141 F.2d 840 (4th Cir. 1944)).

Nor can it be overlooked that in the Griffith case the statement of the defendant was taken under extreme circumstances. Griffith was badly wounded, under heavy sedation,

of youthful age, and was questioned at length by the prosecuting attorney

In the present case, Brubaker willingly gave his confession to the police, and even commented on how well he had been treated. He was certainly no novice in contacts with the police, and the tenor of his confessions certainly lends no evidence to his claim of coercion or fear.

It may or may not be true that the Fourteenth Amendment requires not only that a criminal defendant be given counsel during the pre-trial investigation of a crime but that he also be advised of that right and of his right to be silent. Appellee does not believe this to be the rule either in California or as a matter of due process. (Crooker v. California, 357 U.S. 433, 78 S. Ct. 1287; People v. Crooker, 47 Cal.2d 348, 353, 303 P.2d 753; People v. Kendrick, 56 A.C. 59, 74, 363 P.2d 13.)

In any event, however, even in the Griffith case, the Court based its decision on the grounds of prejudice to Griffith. It is one thing, in determining prejudice, to find the same in a situation where a man has allegedly waived his right to counsel before he even had a chance to consult with that counsel. However, a completely different situation with regard to possible prejudice is presented where a man who is represented by counsel, as was Brubaker, is aware of certain facts and informs his counsel thereof and then counsel determines not to act on the facts. If such a situation requires review

by a federal court, then a new and startling procedure of the habeas corpus jurisdiction of the federal courts has certainly taken place, because defendants in criminal cases will be able to fail to raise points in their state court trials and then subsequently come before federal courts and raise the matter for the first time.

It is also important to note that Brubaker's failure to raise these matters at the appropriate time is in no way attributable to the State of California or its officials. He knew of these alleged facts and so did his trial counsel, and so state action is in no way involved in his failure to properly raise the point.

II

THE DISTRICT COURT PROPERLY FOUND
THAT THE REPRESENTATION AFFORDED TO
APPELLANT IN HIS STATE COURT TRIAL
WAS ADEQUATE AND COMPETENT

As has been stated previously in this brief, it is appellee's contention that the sole question before this Court is whether the representation afforded to Brubaker by his trial counsel was adequate and sufficient within the meaning of the Fourteenth Amendment to the United States Constitution. Some of our argument in this regard was necessarily included in the previous portions of this brief, but perhaps a few brief comments are pertinent here in view of the fact that in his brief before this Court appellant also raises the question of his counsel's competency.

The competency of Brubaker's counsel was the subject of much discussion in the various hearings held before the District Court. The appellant's present counsel have both here and before the District Court severely criticized almost every decision made by Brubaker's trial counsel and every action taken by him; however, when all of these criticisms are summed up, basically all that they amount to is a statement that they would have tried the case differently (RT III, 16-18). Perhaps they would have and perhaps so would have other attorneys; but it is

respectfully submitted that hindsight is much easier than foresight, and it is very ease now to say that certain of the trial counsel's decisions were unwise.

But the making of unwise decisions or the fact that other counsel would have acted differently is not the basis which gives federal courts the right to overturn a state court conviction on the question of the quality of the representation afforded to a defendant. It is not that another attorney could have done a better job which constitutes a violation of the Fourteenth Amendment; it is rather a question of whether the representation given to a defendant was pro forma or reduced the trial to a farce or sham (Powell v. Alabama, 287 U.S. 45), 77 L.Ed. 153). And by no stretch of the imagination could it be said in this case that Brubaker only received a token defense or that his trial was a farce or sham. On the contrary, Brubaker's defense was conducted by a man of long criminal trial experience, and in a fashion which had a definite trial scheme to it. The District Court noted these facts (RT III, 26-28) and decided Brubaker had received "adequate representation by counsel" (see order of USDC dated June 30, 1961).

The ridiculous basis of appellant's criticism of defense counsel can be illustrated in one way by considering the following: Appellant castigates his trial counsel

because "he was unaware of the constitutional defense based upon the 'Griffith rule'" (AOB 58). The Griffith case was decided by this Court on September 12, 1960, and yet the appellant's trial was held in December of 1958. It would, therefore, be a little difficult for trial counsel to be aware of the "Griffith rule".

In connection with his argument that his trial counsel was incompetent, appellant further urges that his defense "was undertaken by the State of California itself in the person of a Deputy Public Defender" (AOB 60), and he somehow draws the startling conclusion that the acts of the public defender were chargeable to the State of California.

This argument is completely lacking in merit. It has clearly been established that public defenders are not representatives of the State or the county, but that they are, instead, in the same position as privately employed counsel (In re Hough, 27 Cal.2d 522, 523, 150 P.2d 448; In re Atchley, 48 Cal.2d 408, 418, 310 P.2d 15). Moreover, the superior quality of the Public Defender's Office of Los Angeles County and of its staff has been commented on by both state (People v. Adamson, 34 Cal.2d 320, 333, 210 P.2d 13; People v. Hughes, 57 A.C. 91, 101) and federal courts (Collins v. Heinze, 125 F.Supp. 186, 188).

III

THE APPELLANT'S PETITION WAS FULLY
AND FAIRLY CONSIDERED BY THE DISTRICT
COURT AND NO PROCEDURAL ERROR OCCURRED
THEREIN

As his final point in this appeal, the appellant has chosen to argue that the transcripts of the record before the District Court disclose "numerous procedural errors and resultant confusion." This appears to appellee to be a rather gratuitously insinuating argument to make regarding a court which gave the appellant every courtesy and consideration.

Appellant has extracted from the record several remarks made by the trial court during the lengthy arguments of this case, and then he argues that these remarks are at odds with the District Court's ultimate disposition of the matter (RT I, pp. 28, 54; RT II, pp. 23, 43, 52; RT III, pp. 39, 40). The remarks extracted are, in reality, lifted out of context, and when read in light of the whole record show nothing more than an attempt by the District Court to fully explain the matter before it.

For example, the first comment referred to by appellant (RT I, p. 28) was followed by a request that counsel for the State explain why he thought defense counsel had not objected to the introduction of the two confessions. This explanation was given (RT I, pp. 29-30), and the court later commented that he could not say that trial counsel employed improper trial strategy (RT

I. p. 33).

As a matter of fact, the record before this Court rather conclusively illustrated that throughout the proceedings in the District Court, the judge correctly understood full well that the only issue before him was the question of the competency of Brubaker's trial counsel (RT I, pp. 37-38, 53; RT III, pp. 13-14, 20, 38-39).

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the judgment of the District Court in this case should be affirmed.

Dated: April 2, 1962.

STANLEY MOSK, Attorney General
of the State of California

JOHN S. McINERNEY, Deputy
Attorney General

Attorneys for Appellee.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES EARL BRUBAKER,

Appellant,

vs.

No. 17583

FRED R. DICKSON, Warden
of the California State
Prison at San Quentin,
California,

Appellee.

PETITION FOR REHEARING

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IN THE UNITED STATES COURT OF APPEALS
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No. 17583

PETITION FOR REHEARING

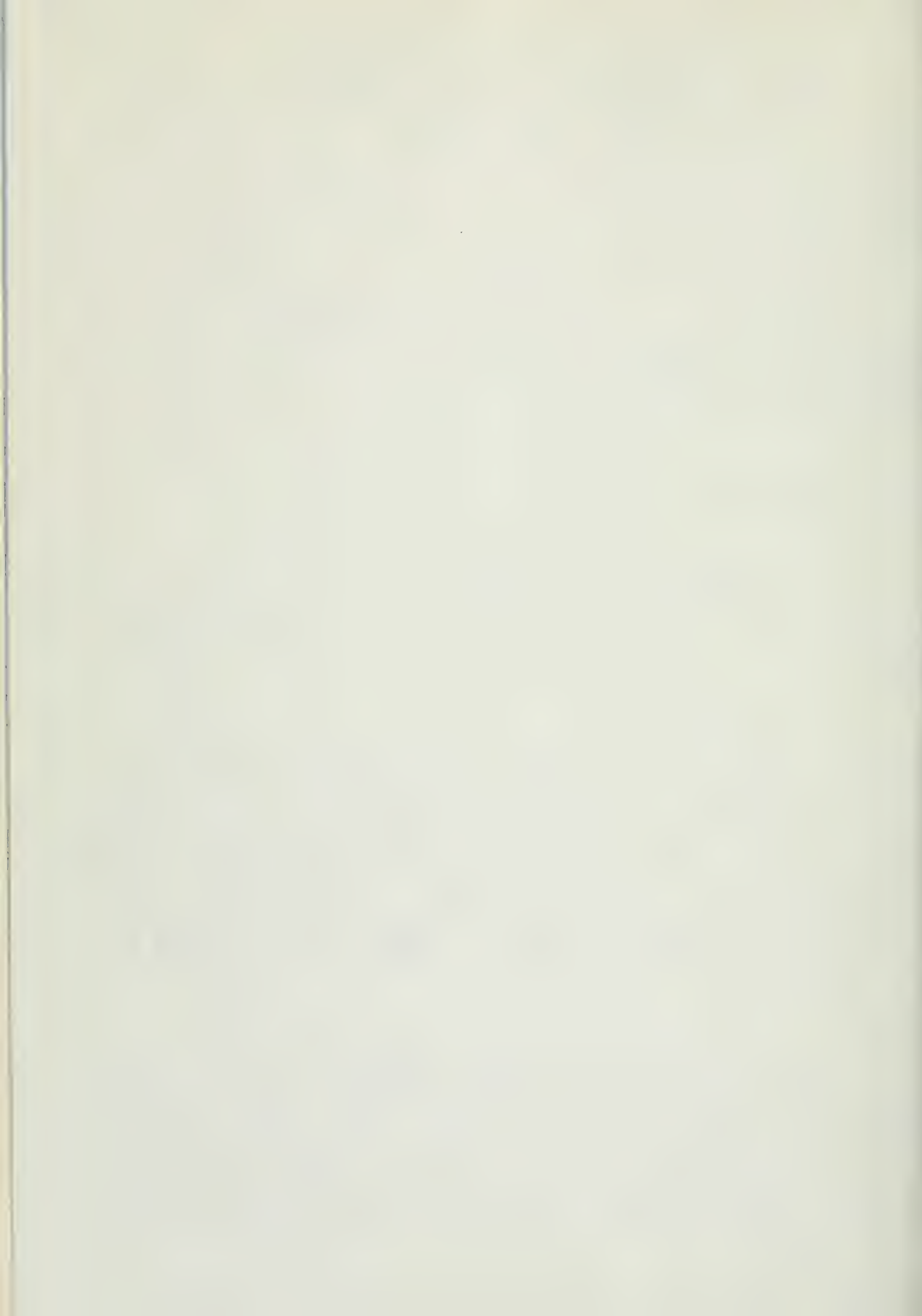
A rehearing should be granted in this case by this
Honorable Court for the following reasons:

I

The decision of this Court erroneously holds that
the Public Defender of Los Angeles County is an "employee of
the State." This is contrary to fact and longstanding California
law (In re Hough, 24 Cal.2d 522, 528-9; In re Atchley, 48 Cal.
2d 408, 418, 310 P.2d 15; People v. Lewis, 166 Cal.App.2d 602,
607; 333 P.2d 428).

II

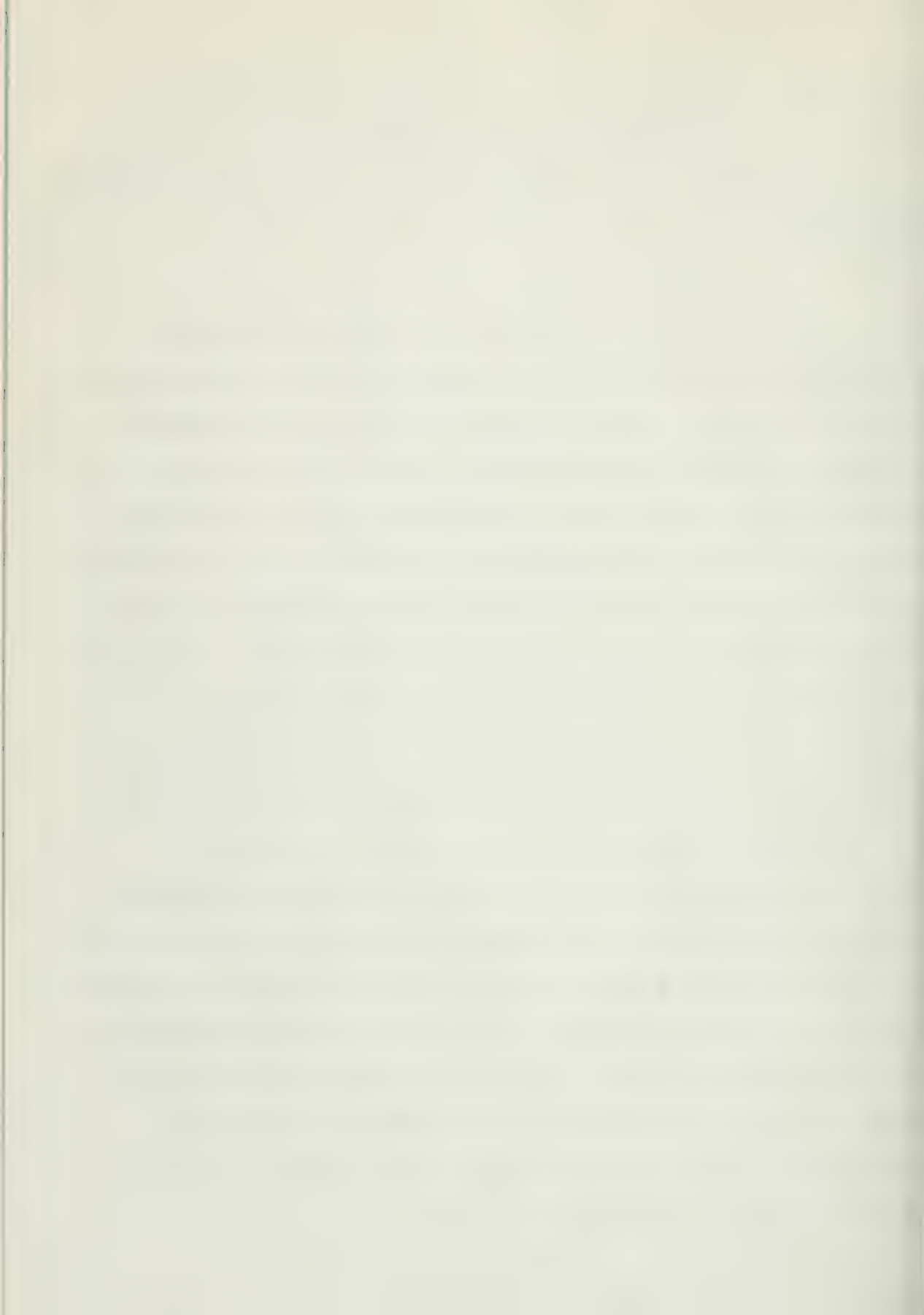
The decision of this Court holds, in effect, that
because petitioner's trial counsel did not do certain things
relative to the conduct of his defense, the legal representation
afforded to petitioner was constitutionally inadequate and



amounted to a farce or sham. It is respectfully submitted that neither the petition filed with this Court nor the trial court record substantiates this conclusion and it is, therefore, erroneous.

III

The decision of this Court fails to distinguish between those cases wherein a criminal defendant was completely denied his right to counsel or where only a token appearance by counsel was made and those cases wherein an appellate court disagrees with certain actions taken by counsel or where the court feels counsel could have done a better job of representation than he actually did. In the first situations, a strict standard should be, and is, imposed on the States. But in the latter situations, an appellate court cannot and should not set itself up as a critical board of review over counsel's choices of actions. This is what has been done by this Court in this case. When the defendant is represented by counsel in a criminal case, there is no state action involved sufficient to justify the issuance of a federal habeas corpus writ unless the actions of that counsel are so lacking in merit as to amount to a farce or sham, and this lack of effective representation was, or should have been, obvious to the trial judge (United States v. Handy, 203 F.2d 407, 427 (3rd Cir. 1953); cert. denied 346 U.S. 869; Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945); cert. denied 325 U.S. 889).



IV

The United States District Court made a specific finding that petitioner did receive adequate representation by counsel at the time of his trial (see order dated July 3, 1961), and the district court made similar comments during the lengthy hearings held on this case (RT I 38, 53; RT III 13-14, 20, 31-32, 38-39). The district court further found that petitioner's confessions were not coerced from him by the police (RT III 37-38). This Court has now held there is no evidence in the record to sustain these findings, and it is respectfully submitted this conclusion by this Court is unwarranted and legally incorrect.

V

The decision of this Court holds that petitioner's allegations regarding the alleged manner in which his confessions were obtained must be considered by this Court in determining the adequacy of the representation afforded to him. This is clearly erroneous in view of his failure to object to the admission of these confessions at the time they were offered into evidence, and in view of the appellant's own admissions in his confessions as to why he was confessing (RT 136, 153), and how fairly he had been treated by the police (RT 106, 163).

VI

The heart of this Court's decision is contained on page 3 of the decision wherein this Court holds that a petitioner should be afforded an opportunity to support his

allegations by proof of matters outside of the trial record. This conclusion is legally erroneous and will necessarily involve the review of many criminal convictions by the federal district court by means of a special hearing in order to see if the defendant received what the reviewing court feels was adequate representation by counsel. Such a procedure is not, and never has been, the rule in this country in either the federal or state courts.

VII

While the decision of this Court quotes from a mass of psychiatric testimony obtained by him after trial to show some sort of mental defect on his part, the decision almost completely ignores the psychiatric examination given to petitioner before trial, which found him to be sane, and which obviously and properly formed the basis for his counsel not securing further psychiatric examinations.

VIII

The effects of liquor and alleged inability to form specific intent are largely irrelevant to petitioner's conviction since he killed in the course of an attempted rape, making it felony murder.

IX

The decision paints petitioner as a virtual "babe-in-the-woods" in regards to contacts with police and the criminal law; as a matter of fact, he had a prior felony record and was far from a novice in this regard. For instance, he knew

enough about his rights to ask for a lawyer. Further, there is no obligation on the police in California to advise him of his right to remain silent (People v. Kendrick, 56 Cal. 2d 71, 83; 363 P.2d 13).

X

The court's decision takes three pages to set out what petitioner's trial counsel did not do and what this Court thinks he should have done, but it makes no point of what he did do and the strategy he obviously employed in trying the case. This Court may not agree with the strategy, but at least it should recognize that a strategy did exist (see, for instance, People v. Gains, 58 AC 644, 646-51).

XI

Trial counsel here was counsel in the case of People v. Stroble, 36 Cal.2d 615; Stroble v. California, 343 U.S. 181, 96 L.Ed. 872 (see affidavit of Buckley dated 27 June 61 and filed with Dist. Ct. that date). He was obviously aware of the decision in Crooker v. California; yet this Court does not even consider the possibility that he decided this case did not fall within those decisions.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that a rehearing should be granted in this case, and that upon rehearing the matter should be heard by this Honorable Court en banc.

Dated: December 13, 1962

STANLEY MOSK, Attorney General
of the State of California

JOHN S. McINERNY,
Deputy Attorney General

Attorneys for Appellee

JOHN S. McINERNY, Deputy Attorney General of the State of California, under penalty of perjury, hereby certifies that in his judgment this petition for rehearing is well founded and that it is not interposed for purposes of delay.

No. 17865 ✓

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON J. GRANT and WALTER F. WISSMAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' SUPPLEMENTAL BRIEF
FILED PURSUANT TO LEAVE OF COURT

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*See also
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON J. GRANT and WALTER F. WISSMAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' SUPPLEMENTAL BRIEF
FILED PURSUANT TO LEAVE OF COURT

In 1958, this Court observed that the law of obscenity was "shifting" and was "in a state of flux". Eastman Kodak Co. v. Hendricks, 362 F.2d 393 (9 Cir. 1958). This state of affairs has not, of course, changed since the indictment was returned herein in September 1960, or since oral argument some three and one-half years ago.

THE INDICTMENT, AND EACH AND EVERY COUNT
THEREOF, FAILS TO STATE FACTS SUFFICIENT
TO CONSTITUTE AN OFFENSE AGAINST THE
UNITED STATES. THE CONVICTION UNDER THE
VOID INDICTMENT DEPRIVES APPELLANTS OF
THEIR LIBERTY AND PROPERTY WITHOUT DUE
PROCESS OF LAW AND ABRIDGES FREEDOMS OF
SPEECH AND PRESS.

Appellants previously argued that the failure to name the allegedly offending books in the indictment rendered the indictment fatally defective. As a minimum, due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial. Russell v. United States, 369 U.S.749, 82 S.Ct.1038, 8 L.Ed.2d 240; United States v. Lamont, 236 F.2d 312 (2 Cir. 1956); United States v. Cruikshank, 92 U.S.542, 23 L.Ed.588. Appellee seems to concede that if the names of the books were not given in response to appellants' demand by a bill of particulars, appellants would be correct in their assertion that they were not adequately advised of the charge they were called upon to defend. Thus, appellee states in its brief (p.12) that "appellants availed themselves of their right to seek a bill

of particulars...and obtain thereby an exact description and identification of the items alleged to have been mailed for each count of the indictment". The trouble with appellee's position is that a bill of particulars cannot cure an otherwise defective indictment. Russell v. United States, supra. Assuming, arguendo, however, that the indictment herein must be read together with the bill of particulars, the indictment is still fatally defective.

In response to appellants' demand for a bill of particulars, appellee alleged that:

"The 'books, pamphlets and other publications' referred to in each count of the indictment were deemed obscene by the standards of the community within the geographic limits of the Central Division of the Southern District."

(C.T.59-61.)

Heretofore, appellants argued that the use of a local rather than a national geographic area was in violation of constitutional standards enunciated by the United States Supreme Court in Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct.1432, 8 L.Ed.639, and followed in Excellent Publications, Inc. v. United States, 309 F.2d 362 (1 Cir. 1962).

Since then, the Supreme Court decided Jacobellis v. Ohio, 378 U.S.184, 84 S.Ct.1676, 12 L.Ed.2d 793, making plain

that even in State cases, a national standard was required, rather than a local one. The Court there said:

"It has been suggested that the 'contemporary community standards' aspect of the Roth test implies a determination of the constitutional question of obscenity in each case by the standards of the particular local community from which the case arises. This is an incorrect reading of Roth....

* * *

"We do not see how any 'local' definition of the 'community' could properly be employed in delineating the area of expression that is protected by the Federal Constitution. MR. JUSTICE HARLAN pointed out in *Manual Enterprises, Inc. v. Day*, supra, 370 U.S., at 488, 82 S.Ct., at 1437, that a standard based on a particular local community would have 'the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency. Cf.

Butler v. Michigan, 352 U.S.380, 77 S.Ct.
524, 1 L.Ed.2d 412.' It is true that
Manual Enterprises dealt with the fed-
eral statute banning obscenity from the
mails. But the mails are not the only
means by which works of expression cross
local-community lines in this country.
It can hardly be assumed that all the
patrons of a particular library, book-
stand, or motion picture theatre are
residents of the smallest local 'com-
munity' that can be drawn around that
establishment. Furthermore, to sustain
the suppression of a particular book or
film in one locality would deter its
dissemination in other localities where
it might be held not obscene, since
sellers and exhibitors would be reluc-
tant to risk criminal conviction in
testing the variation between the two
places. It would be a hardy person who
would sell a book or exhibit a film
anywhere in the land after this Court
had sustained the judgment of one
'community' holding it to be outside the
constitutional protection. The result

1 would thus be 'to restrict the public's
2 access to forms of the printed word
3 which the State could not constitution-
4 ally suppress directly.' Smith v.
5 California, 361 U.S.147, 154, 80 S.Ct.
6 215, 219, 4 L.Ed.2d 205."

7 (378 U.S. at 192, 193-194.)

8 It follows that since national standards
9 are required in a State case, a fortiori, they are required
0 in a federal prosecution. See, Haldeman v. United States,
1 340 F.2d 59 (10 Cir. 1965).

2 It thus appears that the indictment, as amplified
3 by the bill of particulars, does not charge the commission
4 of an offense against the United States since it is no crime
5 to mail books which offend only local standards.

6 In Russell v. United States, supra, the Supreme
7 Court observed that the "vice which inheres in the failure
8 of an indictment...to identify the subject under inquiry is
9 ...the violation of the basic principle 'that the accused
0 must be apprised by the indictment, with reasonably certain-
1 ty, of the nature of the accusation against him'.... A
2 cryptic form of indictment...requires the defendant to go to
3 trial with the chief issue undefined. It enables his convic-
4 tion to rest on one point and the affirmance of the convic-
5 tion to rest on another. It gives the prosecution free hand

on appeal to fill in the gaps of proof by surmise or conjecture" (369 U.S. at 766).

In A Book etc. v. Attorney General of Massachusetts, 86 S.Ct.975, Mr. Justice Brennan said that Roth v. United States, 354 U.S.476, 77 S.Ct.1304, 1 L.Ed.2d 1498, as elaborated in subsequent cases, contains "three elements" which "must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social importance" (86 S.Ct. at 977).

It thus appears that the crime of "obscenity" contains three separate and distinct essential elements. Where, as here, a federal statute has been interpreted in a particular fashion, in the United States Supreme Court, in order to save itself from constitutional infirmity, an indictment must allege these essential elements. Russell v. United States, 369 U.S.749, 82 S.Ct.1038, 8 L.Ed.2d 240.

If it be argued that "a charge that books...are obscene necessarily refers to and incorporates the legal definition of obscenity" (United States v. Luros, 243 F.Supp. 160, 166 [D.C. N.D. Iowa W.D. 1965]), appellee is not aided. At the time of the indictment herein, it was not understood by the United States Attorney, the trial court or the grand

1 jury that the constitutional standard was measured by a
2 national rather than a local standard. Nor was it then under-
3 stood that a work could not be condemned as obscene unless
4 it was utterly without redeeming social importance. Where
5 the law is in a state of flux and the constitutional stand-
6 ards for determining obscenity are "shifting", it is essen-
7 tial, it is respectfully submitted, to allege the constitu-
8 tional standards as they are then understood in the indict-
9 ment. Otherwise, a defendant might be charged and tried on
0 one theory and convicted under another theory in clear viola-
1 tion of due process of law. Cole v. Arkansas, 333 U.S.196,
2 68 S.Ct.514, 92 L.Ed.644; Russell v. United States, 369 U.S.
3 749, 82 S.Ct.1038, 8 L.Ed.2d 240.

II

THE STATUTE - 18 U.S. CODE §1461, AS
CONSTRUED AND APPLIED BY THE TRIAL COURT,
ABRIDGES APPELLANTS' EXERCISE OF
FREEDOMS OF SPEECH AND PRESS, AND AR-
BITRARILY DEPRIVES APPELLANTS OF THEIR
LIBERTY AND PROPERTY WITHOUT DUE PROCESS
OF LAW, IN VIOLATION OF THE FIRST AND
FIFTH AMENDMENTS TO THE UNITED STATES
CONSTITUTION.

1 A. The Statute, as Construed and Applied by the Trial
2 Court, To Authorize the Jury to Measure the Books
3 by Application of the Standards of the Local
4 Community Rather Than the National Community,
5 Abridges Appellants' Constitutional Rights to
6 Freedoms of Speech and Press and Due Process of
7 Law.

8 Appellee labored for ten pages in its brief (pp.
9 18-28) to prove that local standards, not national standards,
0 were to be applied. The United States Supreme Court has
1 settled this argument, beyond dispute, against appellee.
2 Jacobellis v. Ohio, 378 U.S.184, 84 S.Ct.1676, 12 L.Ed.2d 793;
3 Manual Enterprises, Inc. v. Day, 370 U.S.478, 82 S.Ct.1432,
4 8 L.Ed.639.

5
6 B. The Statute, as Construed and Applied by the Trial
7 Court, to Authorize the Jury to Condemn the Books
8 as Obscene, Without Advising the Jury that a Book
9 Could Not be So Condemned Unless It Was Utterly
10 Without Redeeming Social Importance, Abridges
11 Appellants' Constitutional Rights to Freedoms of
12 Speech and Press and Due Process of Law.

13 At no point did the trial court advise the jury
14 that a work could not be condemned as obscene unless it was
15 utterly without redeeming social importance. This essential
16

1 element of the offense of obscenity was first clearly articu-
2 lated by the Supreme Court in Jacobellis v. Ohio, 378 U.S.
3 184, 84 S.Ct.1676; and re-enforced by the Supreme Court in
4 A Book etc. v. Attorney General of Massachusetts, 86 S.Ct.
5 975.

6 It is true that appellants have not heretofore made
7 complaint about this omission. But the trial, and argument
8 on appeal, both preceded the decision of Jacobellis v. Ohio,
9 supra.

0 In Morris v. United States, 156 F.2d 525 (9 Cir.
1 1946), this Court reversed a conviction where the trial court
2 failed to instruct on an essential element of the offense
3 even though no request was made for such an instruction.
4 This Court said:

5 "...It is our opinion that the trial
6 court committed fatal error in failing
7 to instruct the jury on the statutes
8 and regulations governing the offenses
9 charged against appellant. No assign-
0 ment of error was made at the trial
1 covering this claimed error, but we
2 consider it because... '[w]here life or
3 liberty is involved an appellate court
4 may notice a serious error which is
5 plainly prejudicial even though it was
6 not called to the attention of the trial

1 court in any form.' In a criminal case,
2 it is always the duty of the court to
3 instruct on all essential questions of
4 law, whether requested or not....

5 "The court did not define the of-
6 fense of which the appellant was charged
7 and being tried, and the jury was given
8 no opportunity of applying the facts to
9 the law...."

0 (156 F.2d at 527-528.)

1 In Bollenbach v. United States, 326 U.S.607, 66
2 S.Ct.402, 90 L.Ed.350, Mr. Justice Frankfurter dismissed the
3 Government's argument that the Court should not reverse
4 because the defendant was plainly guilty. In this regard,
5 Mr. Justice Frankfurter said:

6 "...[I]t may not be amiss to remind that
7 the question is not whether guilt may
8 be spelt out of a record, but whether
9 guilt has been found by a jury according
0 to the procedure and standards for crim-
1 inal trials in the federal courts."

2 (326 U.S. at 614.)

3
4
5
6

III

THE JUDGMENT OF CONVICTION, WHICH RESTS
ON NO EVIDENCE OTHER THAN THE CHARGED
BOOKS THEMSELVES, DEPRIVED APPELLANTS
OF A FAIR TRIAL, OF THEIR LIBERTIES AND
PROPERTY WITHOUT DUE PROCESS OF LAW, AND
ABRIDGED APPELLANTS' FREEDOMS OF SPEECH
AND PRESS CONTRARY TO THE PROVISIONS OF
THE FIRST, FIFTH AND SIXTH AMENDMENTS
TO THE UNITED STATES CONSTITUTION.

Appellee made no attempt by evidence to prove that the books here involved went substantially beyond customary limits of candor in the description or representation of matters pertaining to sex, in the Nation as a whole, or at all. It presented no evidence to show that the predominant appeal of the books was to a shameful or morbid interest in sex. It presented no evidence to show that the books were utterly without social importance.

Where the "transcendent value of speech" is involved, due process requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech". Speiser v. Randall, 357 U.S.513, 526, 78 S.Ct.1332, 2 L.Ed.2d 1460; Freedman v. Maryland, 380 U.S.51, 85 S.Ct. 734; New York Times Co., et al. v. Sullivan, 376 U.S.254,

271, 277-280, 283-288, 84 S.Ct.710, 11 L.Ed.2d 686;

Thompson v. City of Louisville, 362 U.S.199, 206, and cases cited in fn.13, 80 S.Ct.624, 4 L.Ed.654.

Books and writings do not in themselves prove such elements as contemporary standards, prurient interest or social importance. Whether a book exceeds limits of candor, or appeals to a shameful or morbid interest in sex, or is utterly worthless, can only be established by evidence and not by conjectures, presumptions or subjective reactions. Tot v. United States, 319 U.S.463, 63 S.Ct.1241, 37 L.Ed. 1519; New York Times Co., et al. v. Sullivan, 376 U.S.254, 84 S.Ct.710, 11 L.Ed.2d 686; United States v. Romano, 382 U.S.136, 86 S.Ct.279.

As the Supreme Court has warned on different occasions, and as the Court of Appeals for the Second Circuit made clear in United States v. Klaw, et al., 350 F.2d 155 (2 Cir. 1965), courts and juries in obscenity prosecutions do not sit to act as censors of material personally distasteful to them.

Without proof by evidence, reviewable by an appellate court, that limits of candor have actually been exceeded, or that a writing appeals to no other interest but prurient interest, or is without any importance at all, there is little assurance, it is submitted, that non-obscene writings can be protected. As was stated by the Court of Appeals in Klaw, "it is the record and not our feelings that

must control.... Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity" (350 F.2d at 170).

To permit suppression and punishment without proof of the essential ingredients of an offense, ingredients which are made necessary by the requirements of the Constitution, undermines a broad category of rights guaranteed by the free speech and press and due process provisions of the Constitution. The right to fair notice and hearing, the right of confrontation and the assistance of counsel are meaningless and constitute a mere gloss when the prosecution is not required to prove the elements of an offense.

Pointer v. Texas, 380 U.S.400, 85 S.Ct.1065; Douglas v. Alabama, 380 U.S.415, 85 S.Ct.1074; Brookhart v. Janis, 86 S.Ct.1245; Turner v. Louisiana, 379 U.S.466, 85 S.Ct.546.

Without proof of the elements of the offense of obscenity, "it would be altogether too easy for any prosecutor to stand before a jury, display the exhibits involved, and merely ask in summation: 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured." United States v. Klaw, et al., 350 F.2d at 170.

The only evidence on the issue of obscenity was adduced by appellants. They introduced a large number of books generally circulated in the area where they conducted their business (R.T.229; Exhibits A-1 through A-9); books

1 and magazines generally offered for sale and purchased by
2 the witness Shinbane (R.T.486; Exhibits B-1 through B-53,
3 except Exhibits B-29 and B-30); books purchased in the
4 Court House at or about the time of the trial (R.T.487;
5 Exhibits C-1 through C-28); men's magazines, including those
6 containing various depictions of nudity (R.T.228, 489;
7 Exhibits E-1 through E-53; Exhibits F-1 through F-2);
8 true confession-type magazines (R.T.489; Exhibits G-1
9 through G-13); book advertisements (R.T.219, Exhibits H-1
0 through H-18); newspaper advertisements for burlesque and
1 movies (R.T.490; Exhibits I-1 through I-15); photographs
2 of theatre marquees (R.T.490; Exhibits J-1 through J-15);
3 books entitled Tropic of Cancer by Miller (Exhibit K-2),
4 Advertisements for Myself by Mailer (Exhibit K-3), and The
5 Carpetbaggers by Robbins (Exhibit L).

6 A comparison of the books charged here with this
7 material, all of which was shown to be freely and openly
8 circulating, demonstrates conclusively that the charged
9 books do not go substantially beyond customary limits of
0 candor. Moreover, appellants called a duly qualified
1 expert, Bernarr Mazo, who testified that the charged books
2 do not go beyond customary limits of candor in the descrip-
3 tion or representation of matters pertaining to sex (R.T.
4 453; 479). He also testified that the books would not appeal
5 to the prurient interest of the average person but that, on
6

the contrary, the books appealed to the normal curiosity the average person has in all matters involving the human condition, including sex (R.T.341).

Comparing the three charged books with Tropic of Cancer (see, Grove Press, Inc. v. Gerstein, 378 U.S.577, 84 S.Ct.1909, 12 L.Ed.2d 1305), the witness Mazo testified that these books dealt with sex more vividly and with greater variety than the three charged books. In short, the witness testified that the books were well within the customary limits of candor.

Thus, we have a record where appellee totally defaults in adducing evidence on the essential elements of the offense, and appellants' uncontradicted evidence demonstrates conclusively that the charged books do not meet the constitutional tests of obscenity enunciated by the United States Supreme Court.


So far as the record here is concerned, nothing in the production, sale or publicity relative to the books herein involved amounts to the "pandering" found in the record by the United States Supreme Court in Ginzburg v. United States, 86 S.Ct.942. The total evidence against appellants was a written stipulation of facts establishing that certain advertisements and books were mailed and received (C.T.69), plus the testimony of a postal inspector and a Los Angeles Police Department Sergeant. The postal inspector

identified the advertisements and books involved in the case and an affidavit executed by appellants (R.T.76-100). He also testified that appellants had each told him that they read some, but not all, of the books they distributed by mail. Sgt. DeCamp of the Los Angeles Police Department testified that appellant Grant told him that he had assisted in the preparation of the Continental Publications brochure. This testimony, and the Exhibits, was appellee's entire case. Moreover, this case, unlike Ginzburg, was tried to a jury and not to a court. The jury never was presented with any issue of "pandering" and no such issue was ever decided by the trier of facts. See, DeJonge v. Oregon, 299 U.S.353, 57 S.Ct.255, 81 L.Ed.278; Cole v. Arkansas, 333 U.S.196, 68 S.Ct.514, 92 L.Ed.644. See also, Parr v. United States, 363 U.S.370, 80 S.Ct.1171, 4 L.Ed.2d 1277.

CONCLUSION

The motions of appellants for judgments of acquittal and in arrest of judgment should have been granted by the District Court. The judgment of conviction should be reversed with instructions to dismiss the indictment.

Respectfully submitted,


STANLEY FLEISHMAN
Attorney for Appellants

CERTIFICATE

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.


STANLEY FLEISHMAN

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1680 North Vine Street, Hollywood, California 90028. On the 26th day of May, 1966, I served the within APPELLANTS' SUPPLEMENTAL BRIEF FILED PURSUANT TO LEAVE OF COURT on the appellee in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Hollywood, California, addressed as follows:

Francis C. Whelan, United States Attorney

Thomas R. Sheridan, Assistant U. S. Attorney,

Chief, Criminal Section,

David Y. Smith, Assistant U. S. Attorney

600 Federal Building

Los Angeles, California 90012.

I certify that the foregoing is true and correct.

Executed this 26th day of May, 1966 at Hollywood, California.

Subscribed and sworn to before me
this 26th day of May, 1966

Yvonne Burroughs
YVONNE BURROUGHS

Evaleen Saquin
Notary Public in and for said
County and State.

EVALEEN SAQUIN
My Commission Expires June 18, 1967

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18,903 ✓

*See notes
Vol. 328*

FRED MEYER, INC., ET AL., *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR REHEARING EN BANC

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 18,903

FRED MEYER, INC., ET AL., *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR REHEARING EN BANC

to the Honorable Gilbert H. Jertberg, Ben Cushing Duniway, Circuit Judges, and Roger D. Foley, Jr., District Judge.

The petitioner herein asks for a rehearing en banc, limited to the question whether Meyer knew or had reason to know that the concessions it received were unlawful.

I.

The evidence in this case was limited to transactions between Meyer and five suppliers—Burlington Industries, Inc., Cannon Mills Company, Tri-Valley Packing Association, Idaho Canning Company and Phillip Morris Company. The Court held that Meyer's transactions with Tri-Valley and Idaho Canning were not illegal under section 2(d) of the Clayton Act because there was no showing that Meyer disadvantaged the allegedly disfavored customers (wholesalers) competed at the same functional level; that 2(d) did not require sellers to offer proportionately equal benefits to wholesalers who were not in competition with Meyer. For the

same reason, the transactions between Meyer and Phillip Morris, insofar as they concerned United Grocers, a wholesaler, cannot be considered illegal. (Slip Opinion, p. 11, n. 11).

While the Court's opinion does not discuss this issue in connection with the section 2(a)-2(f) charge, the same reasoning necessarily applies, particularly since there was no showing that the retailers served by the unfavored wholesalers were "indirect" customers of Tri-Valley or Idaho Canning,¹ or that they competed with Meyer in the sale of products purchased from such wholesalers. While 2(a) does not in terms require that the favored and unfavored customers be in competition, it has long been the rule that in order to establish competitive injury there must be competition either between sellers in "first line" cases or between buyers in "secondary line" cases. In a "secondary line" case, such as this, "[s]ome competitive nexus between customers receiving the higher and the lower prices is a basic predicate of any conclusion of adverse effects at the customer level attributable to a seller's price differentials." (Rowe, *Price Discrimination Under the Robinson-Patman Act*, 1962, p. 173) "If particular customer classes do not compete in their resale operations, the supplier's price differentials between them cannot impair competition with the recipient of the lower price." (*Id.* at 176)²

The transactions between Meyer and Cannon Mills cannot be considered illegal under either 2(a) or 2(d) because the hearing examiner, in a companion case against Cannon

¹ The complaint does not charge a 2(a) violation involving Phillip Morris.

² See testimony of FTC Chairman in *Dual Distribution in the Automotive Tire Industry*, 1959, Hearings Before a Subcommittee of the Senate Select Committee on Small Business, 86th Cong., 1st Sess., Part I, at 134-35, 143; *Chicago Sugar Company v. American Sugar Refining Company*, 176 F. 2d 1 (7th Cir. 1949); *Seatore's, Inc. v. Esso Standard Oil Company*, 171 F. Supp. 665 (D. Mass. 1959); *Jarrett v. Pittsburgh Plate Glass Company*, 131 F. 2d 674, 676 (5th Cir. 1942); *A. J. Goodman and Son, Inc. v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890, 893 (D. Mass. 1949); and *Sano Petroleum Corp. v. American Oil Company*, 187 F. Supp. 345 (E.D.N.Y. 1960).

Mills, held that the discount to Meyer—the identical discount challenged here—was fully cost justified (*Cannon Mills Company*, Initial Decision, CCH Trade Reg. Rep., 1963-65 Transfer Binder, ¶ 16,682), and the Commission later dismissed the complaint on the ground there was no injury to competition (*Cannon Mills Company*, CCH Trade Reg. Rep., 1963-65 Transfer Binder, ¶ 16,878).¹

In view of the foregoing, the concessions which Meyer received from Tri-Valley, Idaho Canning and Cannon Mills, and a portion of those received from Phillip Morris, cannot form any basis for the Court's decision that Meyer knew or had reason to know that said concessions were unlawful.

If the foregoing analysis is correct, and we believe it is beyond dispute, the Court's finding that Meyer knew or had reason to know that the concessions it induced were unlawful must have been based solely on Meyer's transactions with Burlington Industries in connection with the 2(a) charge, and solely on transactions with Burlington and Phillip Morris in connection with the 2(d) charge. In other words, the evidential score, at the very least, was 85 percent in petitioner's favor on the 2(a) charge and 70 percent in its favor on the 2(d) charge.²

Based on such a score card we do not think it right or proper for the Court to infer knowledge of illegality,

¹ The respondent, on page 75 of its brief, after referring to the fact that the Commission had dismissed the complaint against Cannon Mills Company, says:

Accordingly, while we rely upon Cannon Mills' discriminations as constituting violations of section 2(d), . . . we do not rely upon its price discriminations as constituting violations of section 2(a), or upon their inducement and receipt by petitioners as constituting violations of section 2(f).

However, since the Commission dismissed the complaint on the ground of lack of injury to competition, we think it is equally clear that respondent cannot rely on the Cannon Mills transaction to support its 2(d) charge.

² On the 2(a) charge only one customer out of seven is left for consideration and under the 2(d) charge only two customers out of seven are left for consideration.

particularly when the remaining evidence was admittedly "weak" and "scanty".

In 1958, during the coupon promotion period, Meyer purchased from Burlington Industries in much greater quantities than the disfavored customer—4308 dozen hose versus 354 dozen, with a price differential of about ten percent (CX 156)—yet this Court held that Meyer had reason to believe that the supplier could have no cost justification defense. This holding, we suggest, is in conflict with the facts, with *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953), and with this Court's holding in *Alhambra Motor Parts v. FTC*, 309 F. 2d 213 (1962). In its Slip Opinion herein, this Court said:

. . . the evidence which supports the Commission's finding that Meyer had reason to believe that the discriminatory terms and prices it received were not cost-justified is weak but not insufficient. (p. 17)

In view of the *Cannon Mills* decision and the great differences in quantity, this finding should be reconsidered.

With reference to the 2(d) charge involving Phillip Morris, the Court said:

The evidence before the Commission on this point is indeed scanty. (Slip Opinion, p. 9)

This case, one of the most important that has ever confronted the retail food industry, where the government has the burden of proof, should not, we respectfully submit, be decided on "weak" and "scanty" evidence.

Even if the Court should reject our other contentions, we do not see how it can possibly disregard the *Cannon Mills* case, *supra*. Based on an elaborate cost study, which is discussed at length in his opinion, the hearing examiner found that the cost savings to Cannon arising from Meyer's larger quantities was 12.135¢ per dozen while the discount was only 10¢ per dozen. Certainly, in the light of this affirmative finding of cost justification this Court should not infer that Meyer *knew* or *should have known* that similar transactions with other suppliers, involving similar differences in quantities, could not be cost justified.

II.

The decision of the Court is in conflict with the spirit and, we believe, the letter of *Automatic Canteen*, *supra*. While the Court "buttressed" its opinion by quoting isolated phrases from *Automatic Canteen*, we are certain that a rereading of the Supreme Court's decision in full text will demonstrate that the decision here is in conflict with the purpose and intent of the Supreme Court's holding, namely, that the statute should not be interpreted as "putting the buyer at his peril whenever he engages in price bargaining," that "[s]uch a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated" (346 U.S. at 73-74).

To paraphrase the Supreme Court in *Automatic Canteen*, if this decision against Meyer stands, it would render the "knowingly" requirement of the statute meaningless (*Id.* at 71), would comprehend any buyer who engages in bargaining with the seller (*Id.* at 72), and would put the Robinson-Patman Act in direct conflict with the broader antitrust policies of the Sherman Act (*Id.* at 74).

Conclusion

For all of the foregoing reasons, petitioner respectfully requests the Court to grant a rehearing. Petitioner also respectfully requests that the rehearing be conducted en banc.

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Certificate of Counsel

I certify that the foregoing petition for rehearing is presented in good faith and is not interposed for delay and is, in my judgment, well founded.

I further certify that, in connection with the preparation of this petition, I have examined Rule 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing petition is in full compliance with that rule.

EDWARD F. HOWREY

Attorney for Petitioners

Certificate of Service

I certify that on this day of April, 1966, ^{three}~~two~~ copies of the foregoing petition for rehearing were served upon the Federal Trade Commission by mailing same, postage prepaid, to Joseph W. Shea, Secretary, Federal Trade Commission, Washington, D. C.

EDWARD F. HOWREY

Attorney for Petitioners

United States Court of Appeals

FOR THE NINTH CIRCUIT

NO. 19039 ✓

EDGAR W. DICKENSON, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
For the Southern District of California
Southern Division

PETITION FOR REHEARING

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FILED

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TABLE OF CASES CITED

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1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 19039

EDGAR W. DICKENSON, JR.,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING

TO THE HONORABLE

RICHARD H. CHAMBERS, Chief Judge

STANLEY N. BARNES, Circuit Judge, and

RAY McNICHOLS, District Judge.

Appellant, EDGAR W. DICKENSON, hereby petitions for a rehearing to reconsider the judgment entered in this action on November 18, 1965, on the following grounds:

1. Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to that feature of the decision wherein he believes this Court may be convinced its result is based upon the application of incorrect legal principles.

2. This Court concedes on Page 3 of its opinion that appellant is on the borderline as to whether he was entitled to a retail exemption. This Court said:

"It is quite obvious that Dickenson, percentagewise, was on the borderline whether he was entitled to the retail exemption."

The Government conceded that Dickenson made the 50% test but disagreed about the 75% test. (See Page 4 of the Opinion.)

(A) Thus, the statutory provisions of the Fair Labor Standards Act, if enforced in this case, will deprive plaintiff of his liberty and property without due process of law in violation of the Fifth Amendment of the Federal Constitution.

(B) It is impossible under the statute to ascertain any standard of guilt.

(C) It cannot be determined with any degree of certainty whether plaintiff is exempt or not exempt since no standards have been set to determine the basis of the 75% exemption. The penal provisions of the statute fail to sufficiently or explicitly inform appellant and those who are subject to it, what conduct on their part renders them liable to its penalties. The statute is so uncertain and indefinite that men of common intelligence must necessarily guess as to its meaning and differ as to its application.

Connally v. General Construction Company, 269 U.S. 385, 45 S.Ct. 126.

3. At most the indictment could only support two counts, Count One and one other count, since Counts Two to Six are based upon the same course of conduct.

U.S.A. vs. Universal C.I.T. Credit Corp., 344 U.S. 218, 224; 93 L. Ed. 260, 73

S.Ct. 227, 22 Labor Case LC 67,295, holds as follows:

"The offense made punishable under the Fair Labor Standards Act is a course of conduct. Such a reading of the statute compendiously treats as one offense all violations that arise from that singleness of thought, purpose or action, which may be deemed a single 'impulse', a conception recognized by this Court in the Blockburger case, *supra*, at 302, quoting Wharton's Criminal Law, 11th ed. Sect. 34."

This motion is made pursuant to Rule 23 of the Ninth Circuit Rules.

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

Dated: December 15, 1965.

SANKARY, SANKARY & HORN

By /s/ MORRIS SANKARY

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ MORRIS SANKARY
Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES BLAIR.

Appellant,

v.

No. 18,949

THE PEOPLE OF THE STATE OF CALIFORNIA,
ROBERT A. HEINZE, WARDEN, et al.,

Appellees.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES BLAIR,

Appellant,

v.

No. 18,949

THE PEOPLE OF THE STATE OF CALIFORNIA,
ROBERT A. HEINZE, WARDEN, et al.,

Appellees.

APPELLEES' BRIEF

JURISDICTIONAL STATEMENT

Appellant, a California state prisoner, filed a motion in the United States District Court for the Northern District of California, Northern Division, seeking leave to file, in forma pauperis, an application for a writ of habeas corpus pursuant to Title 28 U.S.C. Section 2241. The District Court denied the writ on its merits on August 29, 1962, and the District Court also denied appellant's application for a certificate of probable cause on December 3, 1962.

Appellant filed a notice of appeal in propria persona with this Court on or about September 27, 1962. On March 7, 1963, counsel was appointed to represent appellant in this Court. Counsel prepared and filed an application for a certificate of probable cause on

July 19, 1963. The Court entered its order on July 23, 1963, granting a certificate of probable cause for appeal from the district court's denial of the petition for writ of habeas corpus.

STATEMENT OF THE CASE

It was alleged, among other things, in the petition for habeas corpus that appellant's state court conviction was void because appellant was not represented by counsel at the time the indictment was amended to show appellant's true first name.

The state court judgment resulted from appellant's conviction of the sale of marijuana in violation of section 11531 of the Health and Safety Code with two prior felony convictions. The judgment was affirmed on appeal by the Second District Court of Appeal of the State of California on August 18, 1961, and is reported in People v. Blair, 195 Cal.App.2d 1, 15 Cal. Rptr. 533. A petition for rehearing was denied September 1, 1961, and appellant's petition for a hearing by the California Supreme Court was denied October 11, 1961. Certiorari was denied on February 26, 1962 (Blair v. California, 369 U S 807, 7 L.Ed.2d 554, 82 S.Ct. 651).

Appellant filed a petition for a writ of habeas corpus with the California Supreme Court on April 17, 1961, alleging that he was then being denied

access to the courts, and that the trial records of his conviction had been confiscated by the warden of Folsom State Prison. The petition was denied on May 24, 1961. A petition for certiorari was denied December 4, 1961 (Blair v. California, 369 U.S. 807, 7 L.Ed 2d 554, 82 S Ct 651).

Appellant filed a petition for habeas corpus in the Superior Court of the State of California, in and for the County of Sacramento, on January 23, 1962, wherein the allegations were substantially similar to those in the present case. This petition was denied February 19, 1962.

STATEMENT OF FACTS

The facts as set forth in respondent's brief in People v. Blair, 195 Cal App 2d 1, 15 Cal Rptr 533, are as follows:*

"On November 13, 1959 Officer Willie Tusan, Jr , who had been assigned to the Narcotics Division of the Los Angeles police force from July 27, 1959 to March 1, 1960, was riding with Ernest Hammond, an informer who worked with Officer Tusan. At approximately 2:55 P M they drove past the southwest corner of Fifth and Crocker. The informer called to the appellant, who was standing near the corner of

* The Clerk's and Reporter's Transcripts of the state trial court are lodged with the Court. Appellant lodged these records with the court below (see page 22 of petition).

Fifth and Crocker. (Rep. Tr. pp. 25-27) Officer Tusan parked the car down the street near the corner and in a few minutes the appellant and another person walked up to the car and got into the back seat. The other person later turned out to be a person with a nickname of 'Blood'. (Rep. Tr. p. 27.) The informer asked appellant if he was ready to go, to which appellant stated that he was. 'Blood' told him and Officer Tusan to drive to 23rd and San Pedro Streets. (Rep. Tr. p. 28.) As they drove toward 23rd and San Pedro, appellant asked Officer Tusan how many 'joints' he wanted to buy. To a narcotics seller or user, a 'joint' signifies a marijuana cigarette. He told appellant that he wanted to buy fifteen 'joints'. Appellant then told 'Blood' to get fifteen marijuana cigarettes. (Rep. Tr. pp. 28-29.) Officer Tusan then gave Blood \$7.50. 'Blood' got out of the car and walked east down the alley. (Rep. Tr. p. 29.)

"During the time that appellant was in the car, Officer Tusan got the name Clarence Blair. (Rep. Tr. p. 35)

"When 'Blood' returned, he got back into the car. Officer Tusan started the car and proceeded back toward 5th and Crocker Streets. A few minutes after Officer Tusan started the automobile and

started to drive, 'Blood' leaned over toward the front seat and dropped some marijuana cigarettes into the front seat of the car. (Rep. Tr. p. 32.) 'Blood' at that time said that he wanted Officer Tusan to 'stash' them somewhere while he was taking them back to 5th and Crocker Streets because he didn't want the police to stop his car and find the marijuana cigarettes in his car. (Rep. Tr. p. 33.)

"Prior to getting out of the car, appellant pointed to a dark 1949 Chevrolet 4-Door, License No. LEX 199, which he said was the car that he was driving. Appellant said that he lived at 725 East 25th Street which was approximately one block from where they stopped to let 'Blood' out of the car to go and get the marijuana cigarettes. (Rep. Tr. pp. 34-35.)

"After the appellant got out of Officer Tusan's car, Officer Tusan went to the Police Administration Building, the Narcotics Division, and placed his initials on each one of the marijuana cigarettes, at which time he placed the marijuana cigarettes in an envelope and the envelope was sealed with sealing wax. (Rep. Tr. p. 36.) He then turned the envelope and its contents over to his supervisor, Sergeant Cuning, and arranged for transportation of the large envelope with its contents to the Property Division, where it was booked for

safekeeping (Rep. Tr. p 36.) A chemist, an expert in the field of marijuana testified that he chose five of the cigarettes at random, examined them chemically and microscopically, and was of the opinion they contained marijuana. (Rep. Tr. pp. 6-7, 14-15.)

"Officer Tusan testified before a secret hearing of the grand jury, and a secret indictment was issued as a result of this hearing. (Rep. Tr. p. 37.) Subsequent to this hearing there was a roundup of suspected narcotics sellers and pushers in the Los Angeles County area, and the appellant was one of those persons picked up during that roundup. (Rep. Tr. pp. 37-38.)

"Officer Tusan testified on cross examination that he found out that the appellant's name was Charles Blair at the time of the interrogation after he was taken into custody. (Rep. Tr. p. 54.) Officer Tusan at the grand jury indictment did not give the physical description of the appellant because the appellant was named. (Rep. Tr. pp. 55-56.) He testified that he knew appellant at the time of trial as Charles Blair. (Rep. Tr. p. 35.)

"On cross-examination Officer Tusan stated that when he testified before the grand jury, he thought that the appellant's name was Clarence Blair. (Rep. Tr. p. 59.)

"On January 25, 1960 Deputy Sheriff Ralph W. Becker, an expert in fingerprint identification, rolled appellant's fingerprints, and the card on which the fingerprints were placed was signed by the name of Charles Blair. (Rep. Tr. pp. 61-64.) He again rolled the appellant's fingerprints at the time of trial. (Rep. Tr. p. 65.)

"Deputy Sheriff Becker made a comparison of the fingerprints of the appellant which he had rolled on January 25, 1960 with the fingerprints appearing on the certifications of convictions from Missouri and California, and the fingerprint exemplar made at the time of trial. It was his opinion that they were all made by the same person. (Rep. Tr. pp. 61-26, 66-67.)

"Deputy Sheriff Becker testified that on the day of trial, when he was taking the appellant's fingerprints, the appellant said that he was guilty but he was going to let the jury decide. (Rep. Tr. p. 68.)"

SUMMARY OF ARGUMENT

The amendment of the indictment to show appellant's first name as Charles rather than Clarence is authorized by statute in the State of California. Such amendment related to a matter of form and not of substance. An amendment of this type is permissible under federal law.

No possible prejudice could have resulted to the appellant by the absence of counsel at the time of amendment. State court record shows that the amendment was made prior to arraignment and plea. The constitutional rule that a defendant is entitled to counsel at all stages of the proceedings does not require the reversal of a conviction upon a showing that at some particular stage counsel was not in attendance. There must be a showing that the lack of counsel resulted in prejudice to the rights of the defendant. Appellant cannot show prejudice in this case.

An evidentiary hearing by the district court as to appellant's claim of suppression of evidence was not required in this case because such claim was fully explored by the state trial court and adequately reviewed on appeal.

ARGUMENT

I THE INDICTMENT WAS PROPERLY AMENDED
 TO STATE APPELLANT'S TRUE GIVEN NAME
 AND HIS CONSTITUTIONAL RIGHT TO COUNSEL
 WAS NOT ABRIDGED

It is argued that appellant's constitutional rights were violated in that he was not represented by counsel at the time of the amendment to the indictment. The state court record shows that the indictment was amended on December 23, 1959, to show appellant's first name as Charles rather than Clarence, and that defendant

objected to this amendment. The state court record also shows that this amendment was prior to arraignment and plea (CT 4, 4a, 5)

Such amendment is authorized by statute. Section 953 of the California Penal Code provides:

"When a defendant is charged by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being charged by the name mentioned in the accusatory pleading."

Section 989 of the California Penal Code relates to proceedings as to the true name of a defendant. This section provides:

"When the defendant is arraigned, he must be informed that if the name by which he is prosecuted is not his true name, he must then declare his true name, or be proceeded against by the name in the accusatory pleading. If he gives no other name, the court may proceed accordingly; but if he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the accusatory pleading may be had against him by that name, referring also to the name by which he was first charged therein."

Section 1009 of the California Penal Code authorizes an amendment without leave of court at any time before the defendant pleads or a demurrer to the original pleadings is sustained, and permits an amendment for any defect or insufficiency at any stage of the proceedings.

The appellant raised the present issue as to the amendment of the indictment on appeal from the judgment. The Second District Court of Appeal held that the contention was without merit and in connection therewith stated as follows:

"Defendant argues that he was not sufficiently identified before the grand jury and that he was not the person who was indicted. The evidence herein recited is ample to identify defendant as the person who participated in, was indicted for, and was convicted of selling marijuana cigarettes to Officer Tusan. In the officer's testimony before the grand jury he used what he believed to be defendant's correct given name. Upon interviewing defendant he learned he was in error. Hence the amendment of the indictment to state his true given name. There is no question but that defendant was sufficiently identified before the grand jury.

"Defendant complains that he was not represented by counsel when the indictment was amended to show

his true name Defendant did, however, object to the amendment. But it is clear that defendant was not prejudiced in view of the provisions of Penal Code, section 953. The statement of the court in People v. Crooker, 47 Cal.2d 348, at page 353 [303 P.2d 753], is apposite on this point: 'To constitute deprivation of due process, however, the denial of the right of the accused to be represented by counsel in every stage of the proceedings must have so fatally infected the regularity of his trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice. [Citations.]' (See to the same effect Crooker v. California, 357 U.S. 433, 439 [78 S.Ct.1287, 2 L.Ed.2d 1448]; People v. Guarino, 132 Cal.App.2d 554, 557-558 [282 P.2d 538]; Lisenba v. California, 314 U.S. 219, 236 [62 S.Ct. 280, 86 L.Ed. 166].)" People v. Blair, 195 Cal.App. 2d 1, 7; 15 Cal.Rptr. 533.

The state appellate court correctly decided that the amendment did not prejudice the appellant. The constitutional rule that a defendant is entitled to counsel at all stages of the proceeding does not require the reversal of a conviction upon mere proof that at some particular stage counsel was not in attendance. There must be a showing that the lack of counsel resulted in prejudice to the rights of the defendant. This rule is

set forth in Crooker v. California, 357 U. S. 433, 78 S.Ct. 1287, 2 L.Ed. 2d 1448. The court in the recent case of Escobedo v. Illinois, ___ U.S. ___, 12 L.Ed 2d 977, 84 S.Ct. ___, commented upon the Crooker case as follows at page 986:

"Crooker v California, 357 US 433, 2 L ed 2d 1448, 78 S Ct 1287, does not compel a contrary result. In that case the Court merely rejected the absolute rule sought by petitioner, that 'every state denial of a request to contact counsel [is] an infringement of the constitutional right without regard to the circumstances of the case.' Id., at 440, 2 L ed 2d 1454. (Emphasis in original.) In its place, the following rule was announced:

"'[S]tate refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, . . . but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of "that fundamental fairness essential to the very concept of justice. . . ." The latter determination depends upon all the circumstances of the case.' 357 US, at 439-440, 2 L ed 2d at 1454. (Emphasis added.)"

No possible prejudice could have resulted to the appellant by the amendment here in question or by the absence of counsel at the time of the amendment. As previously noted, the amendment was made prior to arraignment and plea, and the indictment was merely corrected to show appellant's true given name as Charles instead of the name of Clarence, the name originally listed on the indictment. Appellant has no constitutional right to be tried under an incorrect name. There seems to be some suggestion in appellant's brief that appellant was not sufficiently identified before the grand jury, or stated another way, appellant was not the person indicted. These arguments find absolutely no support in the state court record. The evidence shows that appellant was identified by Officer Tusan as the person who participated in the sale of marijuana cigarettes to him. Officer Tusan testified that at the time he testified before the grand jury he thought the appellant's name was Clarence Blair; that during the interrogation after appellant was taken into custody, he learned that his name was Charles Blair (RT 54). Thus, the amendment of the indictment to state appellant's true name was the logical and proper thing to do after his true name was ascertained by the officer. The evidence at the trial shows that appellant was sufficiently identified as the seller of marijuana cigarettes to Officer Tusan and the jury's determination

of guilt is adequately supported by the record.

It also appears to be counsel for appellant's position that to allow any amendment to an indictment violates the Fourteenth Amendment. The amendment of the present indictment relates to a matter of form and not of substance. Such amendment as to form is permissible under federal law. In Dye v. Sacks, 279 F.2d 834, a habeas corpus proceeding by a state prisoner, it was held that an amendment to an indictment charging armed robbery by correcting a misdescription of a victim's name related to a matter of form and not of substance, and such amendment did not invade the petitioner's constitutional rights (United States v Fawcett, 115 F.2d 764; United States v. Denny, 165 F.2d 668). It is submitted that an amendment which merely corrects an indictment to reflect a defendant's true name is a matter of form only, and does not prejudice the defendant.

II AN EVIDENTIARY HEARING BY THE DISTRICT COURT AS TO APPELLANT'S CLAIM OF SUPPRESSION OF EVIDENCE WAS NOT REQUIRED

It is argued that under the principles stated in Townsend v. Sain, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745, the court below was required to hold an evidentiary hearing on appellant's claim that evidence had been suppressed in erasing a certain tape recording of an interview with the appellant following his arrest.

In the Townsend case, it was held that in a

habeas corpus proceeding instituted by a state prisoner, a federal court must grant a hearing if (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the applicant a full and fair fact hearing.

The state court record shows that there was a tape recording of an interview with the appellant after he was taken into custody. The statements at trial as to appellant's demand for the tape, the reasons therefor, and the erasure of the tape are as follows:

"MR. ARIEY: My client would like to say something to the Court. The jury is not present.

"THE COURT: Any members of the jury on the Charles Blair matter present in the courtroom?

"I hear no answer, and I don't see any.

"THE BAILIFF: They are all upstairs.

"THE COURT: People versus Charles Blair.

"Let the record show that the defendant is present, together with his counsel, Mr. Arley.

"Mr. Rowen is present, representing the People.

"What do you wish to say, Mr. Blair?

"THE DEFENDANT: Judge, your Honor, this is about my case, concerning the facts I have, concerning my innocence. I'd like to say that at the last minute yesterday the only evidence that I have to prove my innocence have been dismissed, or something, and that is the tape recording in this case. The tape recording in this case will definitely show that I am not Clarence Blair.

"THE COURT: How will it show it, except your own statements?

"THE DEFENDANT: That I am not Clarence Blair I haven't committed no crime or nothing. This was taken down by the officers

"THE COURT: That would not be admissible. Any self-serving statement which you deny would not be admissible

"THE DEFENDANT: But the fact is this: When I was picked up this officer on the stand had me there asking me was I Clarence Blair and did I know John Doe Blood, and the fact that --

"THE COURT: You can testify to that.

"THE DEFENDANT: I know I can testify, but my testimony against this officer's testimony don't mean

anything. I've got proof of my innocence and I'd like to have that tape recording. I'd like to have the tape recording that they say they aren't going to have in this case

"THE COURT: How do you feel about it, Mr. Arley?

"MR. ARLEY: I am confused. I was told by Officer Tusan's superior officer that they had erased the tape and that it doesn't exist now; that the interview was taken down by tape recording and they subsequently erased the tape.

"THE COURT: Will Mr. Tusan testify to that?

"MR. ARLEY: Yes. He said so.

"THE COURT: If they don't have the tape recording, then they can't bring it into court." (RT 81-82.)

Thereafter testimony was given as to the erasure of the tape. Sergeant Cunning testified that the tape was erased on February 22, 1960,* along with other tapes of interviews in order that the tapes could be reused (RT 91, 92), and that an additional reason for the erasure was that the tape consisted of self-serving declarations of the appellant (RT 94). The testimony shows that the erasure was done in the ordinary course of business pursuant to instructions of a superior officer (RT 92, 96).

* The recording was made December 22, 1959. (RT 96.)

This issue was before the state appellate court and was decided adverse to the appellant. The court stated in People v Blair, 195 Cal App 2d 1, 15 Cal.Rptr. 533, at page 8

"Defendant argues that the People suppressed the tape recording of the interview the officers had with him after his arrest; that this interfered with the preparation of his defense, and prevented him from having a fair trial

"The intentional suppression of material evidence by the State would, of course, be a denial of a fair trial and due process. (People v. Kiihoa, 53 Cal.2d 748, 752 [3 Cal.Rptr. 1, 349 P.2d 673].) But the erasure of the tape here in question does not appear to have been done intentionally for the suppression of evidence. The testimony shows that the department was short of tapes and ordered eight or ten tapes erased so that they might be available for reuse. This was done in the usual course of business and pursuant to instructions from a superior officer. After hearing the entire matter explored, the trier of fact impliedly came to the conclusion that erasing the tapes was done in good faith and not for the purpose of suppressing material evidence. The evidence sustains such an implied finding. Clearly, the erasure of the tape did not prevent

the defendant from having a fair trial."

The above statements of the appellate court together with the state court record showed that all evidentiary features pertaining to the erasure of the tape were explored. The evidence shows that the erasure of the tape did not prevent appellant from having a fair trial and nothing was contained therein that could have in any way aided in the preparation of his defense. Inasmuch as the evidentiary aspects of this claim were completely explored at the trial court level and such matters were fully disclosed in the appellate court opinion, the federal district court was not required to grant an evidentiary hearing on this claim.

CONCLUSION

It is respectfully submitted that the judgment of the court below be affirmed.

Respectfully submitted,

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EDSEL W. HAWS
Deputy Attorney General

Attorneys for Appellees

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

EDSEL W. HAWS

NO. 19093 /

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADAI LESER and CZALI LESER,

*Admitted
No. 2306*
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States
District Court for the Southern District
of California, Central Division

APPELLANT'S CLOSING BRIEF

FILED

DEC 16 1965

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APPELLANT'S CLOSING BRIEF

I

REPLACEMENT OF A JUROR

The crutch on which the government rests its first point as to the replacement of a juror after he had become incapacitated and after the jury had deliberated several hours without the consent of the defendants, or either of them, and outside of their presence, does not exist and is not available in the federal courts.

The government leans, for its crutch, on California state practice, which is solely statutory, and contends that there was a waiver by counsel and a stipulation by counsel and therefore the replacement of juror Swan by alternate juror Cholcher, who should have been discharged when the jury retired, was perfectly all right, and it relies on California state cases.

But California's state cases are purely statutory and exist only by reason of California's statutes authorizing such a replacement. Prior to 1933 the substitution had to be before final submission of the case to the jury. Penal Code of California Section 1089 was amended in that year to permit an alternate to come in after the final submission of the case to the jury. This unusual procedure had the unfortunate consequence of adding a juror who did not have the benefit of prior deliberations.

See:

24 Cal. Law. Rev. 735

People v. Love, 21 Cal.App.2d 628

People v. Lanigan, 22 Cal.2d 577

Even in California procedure, and since the prosecution relies on possible waiver, we may take an example from the waiver of trial by jury entirely

under Article 1, Section 7 of the California Constitution. If counsel alone expresses a waiver, even though in the presence of the defendant and presumably with his implied consent, it is ineffective.

People v. Garcia, 98 Cal.App. 702, 277 P.

747

People v. Spinato, 100 Cal.App. 600,

280 P. 691

People v. Pechar, 130 Cal.App.2d 616,

279 P.2d 570

People v. Benjamin, 140 Cal.App.2d 703,

295 P.2d 477

People v. Barnum, 147 Cal.App.2d 803, 808,

305 P.2d 986

People v. Walker, 170 Cal.App.2d 159, 165,

338 P.2d 536

Even though the defendant gestures a consent by a movement of his head downward in a nodding motion, this would not be sufficient.

People v. Pechar, 130 Cal.App.2d 619

In *People v. Holmes* (1960), 54 Cal.2d 442, 353 P. 2d 583, the case was called for trial and the Public Defender advised the court that a jury was waived. The court said "All right, take the waiver". The prosecutor then asked the defendant if he knew he had

a right to a jury trial on the charges. The defendant answered "Yes" and his counsel said "I join in the waiver". The Supreme Court held there was no waiver because the defendant had failed to use express words to that effect. (55 Cal.2d 443)

Even under California practice, if after all alternate jurors have been made regular jurors, or if there is no alternate juror a juror becomes sick or otherwise unable to perform his duties and has been discharged by the court as provided, the jury shall be discharged and a new jury then and afterwards impanelled and the cause may again be tried.

Penal Code of California, Section 1123

The defendant may, of course, avoid this result by consenting personally to a continuation of the trial before a jury of less than twelve.

People v. Patterson, 169 Cal.App.2d 179,
187, 337 P.2d 163

People v. Ragsdale, 177 Cal.App.2d 676, 678

But none of these things occurred in the instant case. The measure of power is that adopted by the rules and approved by the Supreme Court. The argument by the government must be addressed to the rule-making powers of the Supreme Court and to the Congress of the United States, which must pass on those rules

after they are submitted. They cannot be altered by court decision, which is judicial legislation.

It is respectfully submitted, therefore, that it was highly prejudicial for the court to have removed a juror without defendants' knowledge or consent. It also seems strange and interesting that throughout the trial the court was very meticulous in getting the defendants' consents to matters from time to time except this one, when it substituted the juror without the knowledge or consent of the defendants and, in fact, during their entire absence from the courtroom.

The California cases cited by the government on page 34, of course, are those cases which proceeded according to California statutes, which we have discussed. As a matter of fact, all three of the cases were cases in which present counsel was the attorney for the appellants in the state cases.

Patton v. United States does not help the government, as in that case there was a consent of the waiver to try the case by less than twelve jurors by the defendants. It is respectfully submitted that the authority of the attorney does not extend to this fundamental procedure even under California law or under California procedure, which is constitutional

and statutory in that case.

In respect to the issue of prejudice, a denial of a fundamental constitutional right is not cured by showing of prejudice or a lack of prejudice. Prejudice is presumed when a constitutional right is denied.

Hamilton v. Alabama, 368 US 52, 7 L.ed.2d

114

White v. Maryland, 373 US 59, 10 L.ed.2d

193

II

DOUBLE JEOPARDY

Defendants were placed in double jeopardy as the result of the discharge of the juror. What we have said in reference to Point I, therefore, applies to the second point of the argument in respect to removing one juror. We submit that double jeopardy took place when one of the jurors was removed after deliberation without the knowledge and personal consent of the defendants. Another jury continued to carry on and bring in a purported verdict in the case.

We submit, therefore, that the defendants have been once in jeopardy.

People v. Young, 100 Cal. 18

III

UNLAWFUL COMMUNICATION WITH THE JURY

What we have said heretofore about the substitution of the juror shows that there must have been communications outside of the presence of the defendants and their counsel, causing the substitution in the absence of the defendants and therefore, in effect, denying them fully that public trial guaranteed by the Sixth Amendment to the Constitution of the United States and Rule 43, Federal Rules of Criminal Procedure.

There was no waiver by the defendants and this was not an irregularity of the type that Rule 52(a), Federal Rules of Criminal Procedure, was designed to exclude.

IV

THE TRIAL JUDGE WAS GUILTY OF
PREJUDICIAL MISCONDUCT

The trial judge was guilty of prejudicial misconduct by his participation and control of the trial. We have set forth in our opening brief some of the many instances in which the trial judge actively participated in the conduct of the trial.

We think that the rule is well stated that the

trial judge must not so conduct himself that he becomes an advocate or that the jury views that he is taking one side against the other. When he does either of those two things, he ceases to be a judge and assumes the role of the prosecutor and thus aligns his position and his weight against the defendant. Government counsel is already in a weighty position by the mere fact that he is representing the government. The additional weight of a judge thrown in makes it impossible for a defendant to receive that fair trial which due process of law under the Fifth Amendment guarantees to every defendant.

A fair reading of the record in this case will show that the jury could not help but be impressed by the weight the trial judge was giving to the prosecution's case. We will not delineate it any further.

In *Bollenbach v. United States*, 326 US 607, 90 L.ed. 350, it is stated:

"'The influence of the trial judge on the jury is necessarily and properly of great weight,' *Starr v. United States*, 153 US 614, 626, 38 L.ed. 841, 845, 14 S.Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the

judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

It is stated in *Quercia v. United States*, 289 US 466, 77 L.ed. 1321:

"The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling'. This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'".

It is for this Court to determine, upon examination of the entire record, whether the defendants were deprived of fair trial by the activity of the judge and his leaning toward the government in the case.

V

THE INDICTMENT IS INSUFFICIENT TO
CHARGE AN OFFENSE AGAINST THE LAWS
OF THE UNITED STATES.

We have set forth in our opening brief the rules set out by the Supreme Court of the United States in *Russell v. United States*, 369 US 749, 769, 771. We think that where the offense is based upon mail fraud the means of the fraud, to-wit: the letters in furtherance of that scheme, must be set forth in charging the use of the mails to see that, in fact, an offense has been committed by the use of the mails and to protect the defendants against double jeopardy. This the government failed to do in respect to the letters heretofore referred to in the various counts.

VI

THE TRIAL COURT ERRED IN THE ADMISSION
AND EXCLUSION OF EVIDENCE.

It was error to deny the defendants the right to read, on cross-examination, the letters and telegrams set forth in the indictment since the basis of the charge was the letters and telegrams. This was the gravamen of the charges. Denial of this right was a denial of cross-examination.

The court improperly excluded the reading in open court of various letters and exhibits which was an explanation of the gravamen of the charge and erred in limiting, in effect, the cross-examination of the charges.

Herd v. United States, 255 F. 829

Lindsay v. United States, 133 F.2d 368

It is a fundamental right of the defendant in all criminal prosecutions to not only be confronted by the witnesses and documents that are allegedly against him, but to have them presented in explanation of his case. He has the right to have all of those matters fully presented to the jury.

Maddox v. United States, 156 US 237

Robertson v. Baldwin, 165 US 275

Kirby v. United States, 174 US 47

Dowdell v. United States, 221 US 325

Salinger v. United States, 272 US 542, 548

Furthermore, it is a fundamental rule that when a part of a transaction is presented by the government, or one side, that the defendant has a full right to present the rest of it in explanation of it and to have the whole transaction viewed in its entirety. Since the letters and telegrams were a part of the transaction, it was error to exclude them.

California's Code of Civil Procedure, Section 1854, gives that specific right by statute:

"When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood, may also be given in evidence."

See:

Ashley v. Rivera, 220 Cal. 75, 29 P.2d 199
Hatfield v. Levy Bros., 18 Cal.2d 798, 812,
117 P.2d 841

Hawkinson v. Oesdean, 61 Cal.App.2d 712,
719, 143 P.2d 967

Risdon v. Yates, 145 Cal. 210, 213

Clark v. Clark, 133 Cal. 667, 671

Leboire v. Royce, 100 Cal.App.2d 610

In *People v. Whitehead*, 113 Cal.App.2d 43, 243 P.2d 17, the court held that it was error to exclude

on cross-examination the full details and conversation where only acts and movements were brought out on direct examination. By examining the witnesses as it did, the court held that the prosecution opened the door to the cross-examiner to bring out all the facts.

We submit that the letters and telegrams were an essential part of the case and their exclusion constituted reversible error.

In *Bass v. United States*, 20 App. D.C. 232, it was held error to refuse to permit the defendant to read letters to the jury.

Devising a scheme is not the offense. The offense denounces the use of the post office establishment in execution of the scheme.

Sandals v. United States, 213 F. 569

It is the use of the mails after having formed an intention to defraud other persons.

Charles v. United States, 313 F. 707

It is essential that a distinction be made between use of the mails in pursuance of a scheme to defraud and the mere production of a fraudulent result through the use of the mails.

United States v. Bachman, 246 F. 1009

The gist of the offense is the abuse of the mails

and the corpus delicti is the mailing of the letters in execution of the unlawful scheme.

United States v. Jones, 10 F. 469

O'Hara v. United States, 129 F. 551

Brady v. United States, 24 F.2d 397, cert.

den. 278 US 603; see also 24 F.2d 399,

405

Hence it was the right of the defendant to have the letter produced and to cross-examine regarding the use of the letter and the time it was mailed and its relationship to the alleged scheme to defraud, if any.

VII

THE COURT ERRED IN GIVING THE INSTRUCTION ON AGENCY

The Contractors' Consulting Service was organized independently and the evidence shows that it was an independent organization, whose officers were in Pasadena. The officers of the CCS were a Mr. Locke, a Mr. Burkett, and a Mr. Friedlander, who made the alleged representations in the absence of the defendants. It appears that they claimed to be licensed real estate brokers and were not, and they were ordered to cease and desist in their operations.

However, whether they were acting independently or were acting as agents of the appellants was a matter for the jury to determine from all of the evidence and it was error for the court to give the instructions which it did and which, in effect, invaded the province of the jury. It was of no purpose to tell the jurors that they should not pay attention to the judge's holding since the jury weighs every little thing that the judge says as though it was the gospel and holy writ.

Bollenbach v. United States, 326 US 612

We have covered all points fully in our opening brief and they require no further argument, except the following:

XI

USE OF EVIDENCE SECURED BY A NEW YORK

GRAND JURY

We respectfully submit that the matter of using evidence obtained in New York by a New York grand jury in furtherance of the prosecution in Los Angeles was a violation of Rule 6(e), Federal Rules of Criminal Procedure, and a violation of defendants' constitutional rights. The Brooklyn grand jury obtained its evidence not for the purpose of presenting that

evidence in a Los Angeles courtroom and the use of this evidence was highly prejudicial and highly improper. The defendants' rights were violated by the seizure of these books and records for this purpose and it was an unlawful search and seizure in violation of the Fourth Amendment to the Constitution of the United States.

We have fully set out in our opening brief the errors in the court's instructions to the jury which were misleading and an over-simplification of the jury's duties.

XIII

THE HOLDING OF THE TRIAL DURING A RELIGIOUS HOLIDAY

It is respectfully submitted that when the case was first called for trial, it was represented to Judge Yankwich that the trial would last between 7 and 10 days. Instead, it lasted several months. There was no contemplation at that time that the trial would extend into the holiday period. When it did, the court should have, in deference to the defendants' rights, continued the matter for the one day involved.

APPELLEE'S STATEMENT OF THE FACTS

We have answered all of the points in the reply brief of appellee except the statement of the facts. This statement is incomplete. We have dealt with the legal arguments which we thought are sufficient to require reversal without encumbering the Court with a further statement of the facts. However, there should be an amplification and correction of many of the statements made by the appellee.

The record will show that the appellants sought to place before the jury that they were in the business of supplying money for mortgages and that they had placed many hundreds of thousands of dollars worth of mortgages for loans. There was a letter from Dr. Barr that appellants had secured a loan of \$15,200,000 from the Teamsters Union headed by Hoffa. Further, that they had placed them with banks, foundations, FHA and VA loans, apartment house, tract, shopping center and commercial buildings. The court excluded all of this evidence. Further, the appellants made an offer of proof as to the letter from Dr. Barr, which would establish these facts, which offer of proof was denied and rejected.

There was error also in the statement that the appellants had no connections with Hoffa when they

sought to show that they did have connections with people whom they, the appellants, employed: Attorney Lamar Caudle, formerly with the United States government, Phil Weiss, Max Block and others who had carried proposed loans to Hoffa for the appellants. All this evidence was excluded. The court did not allow defendants to produce loans which they had completed, to show their entire operation. The court held that this had nothing to do with the case.

The government alleged that the defendants were engaged in a fraudulent scheme or operation, but never let the defendants produce evidence that, in fact, they placed large and small loans and had commitments from banks directly to them to show that they were engaged in legitimate business. The only evidence admitted related to loans which were unsatisfactory and which were involved in this case, such as had not been carried out.

The court also rejected and refused to allow testimony that the Continental Capital Corporation had other loans from various other people not in any way connected with defendants and that they took money for services in connection with other loans and therefore they were acting as mortgage brokers by themselves and for themselves and were an independent

outfit and were not the agents of the appellants. The appellants sought to prove that they submitted loans to Empire Savings & Loan, a mortgage broker in New York, and they took money from other outfits which the defendants did not in any way handle, thus showing they were not an agent of the defendants but were an independent firm of mortgage brokers. Further, the court rejected proof that the State of California ordered them to cease and desist as they had no right to act as real estate brokers.

Furthermore, the prosecution did not call Friedlander (vice-president of Continental Capital Corporation). He was the one who allegedly made all of the untrue statements about Hoffa for which the appellants were being held and charged. The prosecutor's statements to the court and jury were about this. The defendants did not meet the applicants who made their applications to the company.

ERRORS IN THE APPENDIX TO

APPELLEE'S BRIEF

The appendix of purported moneys received falsely sets forth matters that are untrue or incorrect as far as the appellants are concerned.

The appellants received nothing and had no deals

with Aina Alii or Queen Development.

From Joseph P. Cogan they received a site inspection fee of \$3,000; from Equity Enterprises, \$3,000; from Ferman Builders, \$3,000; from Hi Valley, \$3,000.

The money was returned to Lucot and to Pantry Markets.

They received \$3,000 for site inspection from Rancho Presidio.

They returned the money to Sindell.

They received \$3,000 from Stockman for site inspection; \$3,000 from Tanque Verde; \$3,000 from Tri Valley.

They received nothing from Judge Walters.

The check received from Gardner was not good.

The money received from Seaside Towers was returned.

As to Nat Winkelman, they never met him.

As to the Continental Hotel, there was a site inspection fee paid for another broker.

They returned the fee to Hertweck.

They never received any money from Hon Kau Lee.

They received \$3,000 for site inspection from Tahoe Surf.

This was an entirely different story than apparently the brief represents. The sum of \$3,000

has been regarded as a reasonable fee for site inspections regarding loans.

The story is not told here as to the loans that these defendants actually effected. They were not permitted to show the loans that they legitimately arranged.

CONCLUSION

WHEREFORE, appellants pray that this Honorable Court reverse the judgments below, and each of them.

Respectfully submitted,

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Attorney for Appellants

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

*File
Vol. 3297*

HARRY GAMBOA BUCKLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 19125

BRIEF OF PETITIONER HARRY GAMBOA BUCKLEY
IN SUPPORT OF PETITION FOR REHEARING

After Decision by the United States Court
of Appeals for the Ninth Circuit of Appeal
from the United States District Court for
the Southern District of California,
Central Division

WILLIAM R. BERKMAN
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San Francisco, California

Attorney for Petitioner
under appointment by the Court

FILED

SEP 20 1966

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRY GAMBOA BUCKLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 19125

BRIEF OF PETITIONER HARRY GAMBOA BUCKLEY
IN SUPPORT OF PETITION FOR REHEARING

I

JURISDICTIONAL STATEMENT

Petitioner Harry Gamboa Buckley (Buckley) appealed pursuant to 28 U.S.C. §§ 1291 and 1294 from a judgment of conviction in the United States District Court for the Southern District of California, Central Division, after a trial by jury on an indictment charging him with eleven counts of aiding and abetting (18 U.S.C. § 2) certain co-defendants in violations of 21 U.S.C. § 174. By decision dated April 28, 1965, this Court affirmed the conviction.

Buckley filed a Petition for Rehearing in this case on June 24, 1965 on the ground that he was denied

a fair review of his appeal by reason of inadequate preparation and prosecution of the appeal by counsel who has subsequently been dismissed. Buckley respectfully requests, in the interests of justice, that this Court rehear and reconsider this case.

II

STATUTES INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

"Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 18, United States Code, Section 2, provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

III

STATEMENT OF FACTS

Buckley was charged as an aider and abettor with others in the knowing and unlawful receipt, concealment and facilitation of concealment and transportation of heroin (C.T. 2). The others charged as principals in these counts were Mary Delgado Ramirez, Charlotte Orozco Vasquez, Virginia Garcia Rivas and Juliano Lopez Molano.

The evidence adduced at the trial relating to Buckley has been summarized in the Government's brief:

"(a) During April or May 1963, Buckley met with Rudolph Esquivel and had a conversation with 'Rudy' regarding having a girl contact Esquivel to take care of him concerning a supply of heroin;

(b) Buckley took Esquivel's phone number and told Esquivel he would have some girl call him later on who would take care of him;

(c) A subsequent meeting took place between Buckley and Esquivel at the Coral Room, whereat Buckley was disturbed by Esquivel's tardiness, and following which Buckley escorted Esquivel around the corner to a laundromat where he introduced him to appellant Mary Ramirez, she being identified by Buckley as the person who he would see from then on and who would 'take care of him';

(d) Immediately following Buckley's departure from the laundromat, leaving Esquivel and Ramirez together, an unknown male entered the laundromat and delivered a quantity of heroin to Esquivel;

(e) Ramirez then asked Esquivel when she should call him and he told her in five days;

(f) Esquivel had given his phone number to Buckley for future contact, and not to Ramirez; yet five or six days after the laundromat introduction,

Ramirez telephoned Esquivel regarding his purchasing heroin;

(g) On the night of July 3, 1963, just prior to the first transaction charged in Counts One and Two of the Indictment which occurred the following day, Buckley met with Ramirez and an unidentified male Mexican, outside of Ramirez' mother's house, and engaged in conversation for approximately thirty minutes;

(h) During the early part of July, 1963, Buckley, at Ramirez telephonic request, provided Virginia Garcia with a ride, whereafter Ramirez admonished Garcia regarding Buckley, 'don't ever mention his name in front of nobody';

(i) Appellant Ramirez, when discussing the inferior qualities of the heroin she had been providing for Esquivel told him, 'We keep it in separate places. I can't understand why it got messed up. . . . We have it packaged the same way; we get it from down below.'; (Emphasis added.)

(j) Buckley was described as a man who 'is pretty hard to find';

(k) Buckley had been at appellant Vasquez' house at least on one or two occasions:

(l) Following Buckley's arrest he told his female companion 'to watch everything carefully because . . . (the agents) may try to plant him'; lost his 'cocky' attitude when confronted with a \$20 bill which had been in his possession and which matched the serial numbers on the bills given to Mary Ramirez by Esquivel in the July 6 heroin transaction; and told Deputy Velasquez to release his female companion saying, 'This is the first time I have been down below and did conduct any business. . . . She doesn't know anything about it. You ought to let her go'; (Emphasis added.)

(m) Buckley denied to the officers knowing Ramirez, Vasquez or Virginia Garcia." (Appellee's Brief pp. 30-32.)

In his testimony Buckley denied giving or furnishing any person heroin (R.T. 537-38).

Upon conclusion of the Government's case Buckley unsuccessfully moved for a judgment of acquittal on the grounds of insufficiency of the evidence (R.T. 495-497). The same motion was unsuccessful at the close of the case (R.T. 564).

The Trial Court instructed the jury, among other things, that an essential element in proving the offenses charged, included "knowledge of the accused that the narcotic drug had been imported into the United States of America, contrary to law, as charged" (R.T. 685, 686).

The jury found Buckley guilty on all eleven counts (R.T. 700). His motions for judgment of acquittal and/or for a new trial were denied (R.T. 703-704). Buckley was subsequently sentenced to ten years imprisonment on each of the eleven counts, the sentences to run concurrently (C.T. 22).

IV

SPECIFICATION OF ERRORS

1. There was no competent evidence to sustain the judgment of conviction.

2. The indictment was defective and did not state an offense.

Buckley's brief on appeal raised but inadequately presented the first error specified above. The second error specified above was not presented to the Court in the brief on appeal. It is submitted that the error should be considered by the Court.

V

SUMMARY OF ARGUMENT

The evidence was insufficient to sustain the conviction of Buckley. Knowledge by Buckley that the heroin had been illegally imported was an essential element of the offenses charged. That element was not established.

The indictment alleging violations of 21 U.S.C. § 174 by other defendants and violations of 18 U.S.C. § 2 by Buckley as an "aider and abettor" of the § 174 violations was defective as to Buckley by failing to allege, in addition, that Buckley had the requisite knowledge of the illegal importation of the narcotic drug which is an essential element in stating an offense.

VI

ARGUMENT

- A. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF BUCKLEY BECAUSE IT WAS NOT ESTABLISHED THAT HE HAD KNOWLEDGE THAT THE NARCOTICS WERE ILLEGALLY IMPORTED.

Knowledge of illegal importation of narcotic drugs is an essential element of the offense of aiding and abetting a violation of 21 U.S.C. § 174.

"[K]nowledge [of illegal importation of narcotic drugs] or possession (actual or constructive) must be shown as to an aider and abettor."

Hernandez v. United States, 300 F.2d 114, 123 (9th Cir. 1962).

"[I]f a certain knowledge or intent is required to be proven in order to convict one of violating a federal criminal statute, the proof to convict one as an aider and abettor will not be different from that necessary to convict the violator, except that aiding, abetting, commanding, inducing, or procuring the commission of the crime must be proven rather than actual commission."

United States v. Jones, 308 F.2d 26, 31-32 (2nd Cir. 1962) (In Banc).

"Since an aider and abettor must have the same knowledge and intent required of the principal, however, proof of knowledge of illegal importation is also necessary to a conviction for aiding and abetting. . . .

Thus a person who facilitates, aids or abets, or conspires in violation of 21 U.S.C. § 174, and who can be shown to have had possession of the drug, can be convicted without independent proof of knowledge of illegal importation."

United States v. Hernandez, 290 F.2d 86, 89 (2nd Cir. 1961).

There is no evidence in the record regarding actual knowledge by Buckley of the illegal importation of the narcotics nor did the Government attempt to prove actual knowledge. Rather, the Government contended Buckley had constructive possession of narcotic drugs and relied upon the statutory presumption contained in 21 U.S.C. § 174:

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." (21 U.S.C. § 174.)

But even assuming the evidence against Buckley is viewed in a light most favorable to the Government (see pp. 3-4 supra), as a matter of law constructive

possession was not established. This evidence at most merely shows that Buckley introduced a purchaser of narcotics to a seller and subsequently obtained a \$20 bill which had been part of the \$525 used to purchase the narcotics. The evidence is not sufficient for a finding that Buckley had constructive possession of narcotics. It is insufficient as a matter at law.

"Constructive possession is a legal conclusion, derived from factual evidence, that one not having physical possession of a thing in fact nevertheless has possession of that thing in legal contemplation." [Emphasis added.]

United States v. Jones, 308 F.2d 26, 30-31 (2nd Cir. 1962) (In Banc).

Constructive possession for purposes of section 174 has been variously defined as "power to control" (Hernandez v. United States, 300 F.2d 114, 117 (9th Cir. 1962)); "control or dominion" (United States v. Mills, 293 F.2d 609, 611 (3rd Cir. 1961)); "dominion and control" (Rodella v. United States, 286 F.2d 306, 312 (9th Cir. 1960)); (Cellino v. United States, 276 F.2d 941, 946 (9th Cir. 1960)); and "power to control disposition" of narcotics and ability "to assure their production" (United States v. Jones, 308 F.2d 26, 30 (2nd Cir. 1962) (In Banc)).

The way to test the facts in this case is to compare them with factual situations where the requisite constructive possession was or was not established. Such a comparison leads to the inevitable conclusion that Buckley was not in constructive possession of the narcotics.

The following cases were concerned with evidence remarkably similar to that in the instant case wherein it was held that constructive possession had not been established:

1. In United States v. Jones, 308 F.2d 26 (2nd Cir. 1962) (In Banc), the defendant had been approached by an undercover agent who wanted to purchase narcotics. Defendant introduced him to a seller and told the agent the price after a conversation with the seller. The seller delivered the narcotics to the agent in the presence of the defendant and defendant received money from the agent. The court reversed on the grounds that constructive possession had not been established in the absence of the type of proof showing that defendant set the price, had the final say as to means of delivery or was able to assure delivery. That type of proof is also lacking in the instant case. There is no evidence that Buckley did any negotiating, set any price or had any say as to means of delivery. Indeed, the first delivery was not by Ramirez, the person to whom Buckley introduced Esquivel, but by an unknown third person. There is no evidence of any contact between Buckley and Esquivel after the first conversation and the introduction to Ramirez.

2. In Williams v. United States, 290 F.2d 451 (9th Cir. 1961), a conviction was reversed when the appellate court determined that constructive possession had

not been established on evidence that defendant had been paid by the informer and narcotics were discovered near the premises where the defendant was employed.

3. Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962) reversed a conviction on the grounds that evidence that the defendant arranged a sale of narcotics to a Government agent, but was not present when the sale was made, was insufficient to establish defendant's constructive possession of narcotics.

The cases where constructive possession has been found are equally illuminating for they indicate the kind of evidence which is necessary for such a finding and which does not exist in the instant case:

1. In Cellino v. United States, 276 F.2d 941 (9th Cir. 1960), there was evidence that the defendant took the purchasers to the seller, assured the purchasers of the sale and was present when the sale was made. One court has characterized the Cellino decision as "the most tenuous inference of possession which any appellate court has sanctioned." United States v. Mills, 293 F.2d 609, 611 (3rd Cir. 1961). In the instant case the inference must be even more tenuous.

2. In Enriquez v. United States, 338 F.2d 165 (9th Cir. 1964), the defendant promised and obtained a sample of narcotics before the sale, negotiated arrangements, took an active part in the transaction, received

full payment from the purchaser, and assured purchaser of a future supply.

3. In United States v. Ramis, 315 F.2d 437 (2nd Cir. 1963), defendant was a frequent dealer in narcotics who negotiated the sale and price, stated the amounts he would deal in, defended the quality of the narcotics, accompanied the purchaser to place of delivery, and upon completion of the transaction asked the purchasers if they would do business again.

4. In Lucero v. United States, 311 F.2d 457 (10th Cir. 1962), the evidence showed that the defendant was the moving party of the sale transaction, vouched for the quality of the narcotics, set the price, arranged the delivery, and was able to assure the delivery.

5. In United States v. Carter, 320 F.2d 1 (2nd Cir. 1963), the defendant negotiated the sale, set the price, received the payment, arranged for and advised purchaser of place and time of delivery, and assured purchaser of quality and weight of delivery.

6. In United States v. Douglas, 319 F.2d 526 (2nd Cir. 1963), the defendant quoted prices to the purchaser, set the purchase price, accepted full payment, and brought about delivery.

7. In United States v. Manna, 353 F.2d 191 (2nd Cir. 1965), the evidence established defendant's control of the narcotics by bringing about sales that would

not have been made without his participation. The sales were made reluctantly and only because of the defendant's requests.

The kind of evidence which sustains findings of constructive possession does not exist in the instant case. Accordingly, it is submitted that as a matter of law, Buckley cannot be deemed to have been in constructive possession of narcotics. Since there is no evidence in the record of actual knowledge of the illegal importation of the narcotics in question, the essential elements of the offense have not been established and his conviction must be reversed.

B. THE INDICTMENT AGAINST BUCKLEY ALLEGING VIOLATIONS OF 18 U.S.C. § 2 WAS DEFECTIVE IN THAT IT OMITTED AN ELEMENT OF THE OFFENSE BY FAILING TO ALLEGE THAT BUCKLEY KNEW THE NARCOTICS WERE ILLEGALLY IMPORTED.

The indictment alleges eleven violations by the other defendants of 21 U.S.C. § 174 and alleges eleven violations by Buckley of 18 U.S.C. § 2 as an "aider and abettor" of the § 174 violations.

The counts in the indictment generally take the following form: "On or about [dates], in Los Angeles County, within the Central Division of the Southern District of California, defendants [named], knowingly and unlawfully received, concealed [or sold] and facilitated the concealment and transportation [or sale] of [quantity] of heroin, a narcotic drug, which as the defendants then and there

well knew, previously had been imported into the United States of America, contrary to United States Code, Title 21, Section 173. At said time and place Harry Gamboa Buckley aided, abetted, concealed, induced and procured the commission of the offense charged or alleged above." (See R.T. 680-85.)

The indictment as to Buckley was defective for failing to allege that Buckley had the requisite knowledge that the narcotic drug had been illegally imported into the United States. Buckley was not charged in the indictment with the substantive offense of violating 21 U.S.C. § 174. Only the other defendants were alleged to have had knowledge that the narcotic drug in question had been imported illegally. Such knowledge by Buckley was an essential element of the offense of aiding and abetting.

"Since an aider and abettor must have the same knowledge and intent required of the principal, however, proof of knowledge of illegal importation is also necessary to a conviction for aiding and abetting."

United States v. Hernandez, 290 F.2d 86, 89 (2nd Cir. 1961).

But the indictment did not allege that Buckley had such knowledge. Therefore, the indictment was fatally defective and did not state an offense with regard to Buckley.

See Robinson v. United States, 263 F.2d 911 (10th Cir. 1959) (Indictment charging an offense under 21 U.S.C. § 174 fails to state an offense if it fails to allege that the accused knew the narcotics were illegally imported.);

United States v. Calhoun,
257 F.2d 673 (7th Cir. 1958)
(Indictment charging a conspiracy to violate 21 U.S.C.
§ 174 was defective in failing to allege an element
of offense, to wit, that accused knew the narcotics
were illegally imported.).


VII

CONCLUSION

On the basis of the foregoing, it is submitted
that the Court must grant a rehearing, reconsider the
appeal of Buckley and reverse the judgment of conviction.

Dated: September 20, 1966

Respectfully submitted,


William R. Berkman
Attorney for Petitioner
Harry Gamboa Buckley
under appointment by
the Court

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRY GAMBOA BUCKLEY,

Appellant,

vs.

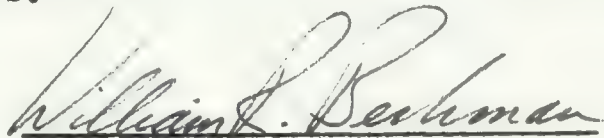
UNITED STATES OF AMERICA,

Appellee.

No. 19125

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


Attorney for Petitioner
Harry Gamboa Buckley
under appointment by the Court

AFFIDAVIT OF SERVICE BY MAIL (C. C. P. 1013A)

(Must be attached to original or a true copy of paper served)

OF CALIFORNIA
AND SAN FRANCISCO
OF SAN FRANCISCO } ss.

NO. 19125

WILLIAM R. BERKMAN

, being sworn, that he is a

of the United States, over 18 years of age, ~~residing~~ residing

a party to the within action.

his ~~business~~ (business) address is 120 Montgomery Street, San Francisco, California

three (3) copies of Brief of Petitioner, HARRY GAMBOA BUCKLEY, in
served ~~of~~ the attached Report of Petition for Rehearing.

said copies in an envelope addressed to Manuel Real, Esquire, United States Attorney

his ~~residence~~ address 600 Federal Building

Los Angeles, California 90012

envelope was then sealed and postage fully prepaid thereon, and thereafter was on September 20,

deposited in the United States mail at San Francisco, California

by delivery service by United States mail at the place so addressed, or regular communication by United States mail

at the place of mailing and the place so addressed.

and sworn to before me on September 20, 1966

Alice C. Morse
Public in and for said county and state.

ALICE C. MORSE

William R. Berkman
William R. Berkman

True copy of the within this day of 19

Attorney for

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC COAST EUROPEAN CONFERENCE)
and its Member Lines,)
)
Petitioners,)
)
v.)
)
FEDERAL MARITIME COMMISSION and)
UNITED STATES OF AMERICA,)
)
Respondents.)

No. 19,241

PETITION FOR REHEARING

Pursuant to Rule 23 of the Court's Rules,
petitioners herewith respectfully petition for rehearing
of the decision herein, filed April 7, 1966, on the ground
that the Court did not in any fashion resolve the fundamental
and far-reaching questions which were put to it.

During the course of the oral argument, the
writer of the Court's opinion himself acknowledged that the
administrative order in question was unique and distinguishable
from all orders theretofore judicially considered. Yet the
Court's opinion now sustains the order solely on the basis
of these highly distinguishable cases, without any legal
reasoning to bridge the gap.

The Court's apparently conclusive reliance on St. Regis* is demonstrably erroneous. Not cited or argued to the Court, by either side, it is no support for the order involved here. What we contested was the use of a "reporting" order as a subpoena within the context of a formal, quasi-judicial proceeding. What St. Regis involved was the use of a similar reporting order prior to the issuance of a complaint. See 285 F.2d at 609, and again at 612; see also the district court's decision, 181 F.Supp. 862, at 865. Thus the order there concerned was no different from the any other pre-complaint investigations involved in the remaining cases cited in the Court's brief opinion. It is no authority for the present, in-hearing order.

The sustaining of this order breaks open an entirely new and vast arena of permissible agency investigative activity, not just limited to this one Commission but equally applicable across the board of administrative process. The step, even if ultimately to be taken, should be made only in a reasoned consideration of its myriad implications -- not, as here, in mere reliance upon earlier cases, none of which provides a precedent.

This Court was squarely faced with an issue of undoubted first impression. No court, insofar as we can find, has ever considered it, and here it was the sole, focused issue --

United States v. St. Regis Paper Co., 285 F.2d 607, 611 (2d Cir. 1960), affirmed, 368 U.S. 208 (1961).

the only matter the Court was asked to consider and decide. The decision of the Court, however, simply ignores both the issue and the argument, treating as decisive what was presented as merely the starting-point.

The Court's summary, one-sentence rejection of the applicability of A.P.A. §3(a) equally relies, without elaboration, upon an inapplicable "precedent." The only citation (and there is no discussion) is to a reference in another case to A.P.A. §6(a). We did not argue §6(a); we argued §3(a). And as our brief pointed out at length, they are totally different provisions. Again, the Court has decided a question of great importance in a mere footnote fashion.

The decision of which reconsideration is here sought is appallingly bad law. A per curiam affirmance, which made no pretensions of rationalizing its conclusion, would in the orderly development of the legal process have been far superior. The instant decision, on the other hand, creates even more bad law than it sustains.

The grossly unfair effect of the decision is to authorize administrative agencies to subpoena documents and call for reports in their formal adjudicatory proceedings. Since penalties apply immediately to non-compliance with the reporting requirements, the individual will lose his right


to test the relevancy of every such order for production,
a right guaranteed by the due process clause itself. Orders
to report prior to adjudication and orders to produce at a
hearing are separately provided for in the statute, viz.,
Sections 21 and 27, and that separation should be preserved.
The decision of this Court destroys it.

For its massive implications on the whole of the
administrative process, if not simply to afford petitioners
a meaningful judicial review, rehearing should be granted,
so that the Court may consider the arguments presented.

Respectfully submitted,

GRAHAM JAMES & ROLPH
Leonard G. James
F. Conger Fawcett

By



F. Conger Fawcett

Dated: April 26th, 1966.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by delivering by hand or by mailing via first class mail or air mail, postage prepaid, a copy to each such party or its attorney.

Dated at San Francisco, California, this
26th day of April, 1966.



F. Conger Fawcett

NO. 19293 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. MORGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

JAN 12 1967

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NO. 19293

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. MORGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT
AND
STATEMENT OF THE CASE

On March 31, 1962, a six-count indictment was returned against appellant and one Maxmillian B. Michelson on charges of conspiracy to obtain payments from the United States by means of filing false and fictitious income tax returns, filing false claims in violation of 18 U. S. C. §287 and uttering a forged writing in violation of 18 U. S. C. §495 [C. T. 2-8]. 1/

Count one charged both appellant and Michelson with conspiracy; Counts two through five charged them with filing false,

1/ "C. T. " refers to Clerk's Transcript on Appeal.



fictitious and fraudulent claims for refunds; and Count six charged Michelson with uttering a writing containing forged endorsements.

Both appellants were arraigned on May 21, 1962 [Transcript of Proceedings of May 21, 1962], and subsequently entered pleas of not guilty to all counts.

Appellant filed numerous pretrial motions among which were a motion for a bill of particulars [C. T. 9], a petition to be released on bail [C. T. 153], a motion for "Production of Material for Inspection Prior to Trial" [C. T. 18], and in addition submitted to the Court an order to be signed by the Court allowing appellant certain privileges in connection with his preparation of the case, while confined in Los Angeles County Jail [S. S. C. T. 1]. ^{2/}

All of the above motions were denied on September 24, 1962, with the exception of the request for jail privileges upon which the Court did not act [Minute Order of September 24, 1962].

On November 26, 1962, appellant appeared in court in propria persona, at which time, the Court urged him to accept the services of a court-appointed counsel [R. T. 11]. ^{3/}

On December 3, 1962, co-defendant Michelson pleaded guilty to Counts four and six of the indictment and the case as to him was continued for sentencing to December 17, 1962 [R. T. 44].

Appellant's trial by a jury before the Honorable Harry C. Westover, United States District Judge, commenced upon December

^{2/} "S. S. C. T. " refers to second supplemental Clerk's Transcript on appeal.

^{3/} "R. T. " refers to Reporter's Transcript.



4, 1962 [R. T. 58].

At the conclusion of the Government's case, the Court granted a motion for judgment of acquittal as to Counts one, two, and five of the indictment [R. T. 353, 355, 368]. The Court did permit the Government to re-open its case in chief for the purpose of proving that the returns were filed in the Southern District of California [R. T. 376].

On December 7, 1962, the jury returned a verdict on only one of the two counts, whereupon the Court instructed the jury to return to the jury room for deliberation until they had reached a verdict on the other count [R. T. 442-446]. The jury then returned a verdict of guilty on both counts three and four of the indictment [R. T. 448].

On January 28, 1963, appellant was sentenced to five years on each of Counts three and four to run consecutively to each other as well as to all other sentences, both State and federal [R. T. 485].

Appellant filed motions for new trials, which were denied [C. T. 112, 115]. A notice of appeal was timely filed [C. T. 144].

The jurisdiction of the District Court was predicated on Title 18, United States Code, Sections 287 and 3231. This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.



II

STATUTE INVOLVED

Title 18, United States Code, Section 287 provides:

"Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than \$10,000 or imprisoned not more than five years, or both. "

III

STATEMENT OF FACTS

In December, 1959, appellant was an inmate at the Wayside Honor Ranch, a California state penal institution, where he was working as a trustee in the maximum security hospital [R. T. 187-188]. While he was working in the hospital, he met co-defendant Michelson, who was not an inmate, but was employed at the hospital as a registered surgical nurse [R. T. 186-187]. In the course of conversation, Michelson mentioned that he needed money [R. T. 209-210]. Appellant suggested to Michelson that there were numerous inmates who had tax refunds due to them, but who didn't want their wives to receive the checks. Appellant then stated that



he could fill out the returns and get them signed if Michelson could get addresses outside of the prison where the refund checks could be mailed [R. T. 211]. To this Michelson agreed, and he did obtain such addresses of other employees at the hospital as well as of a friend who operated a local service station [R. T. 211, 214]. These addresses were furnished appellant who stated that he didn't need to fill out inmates' returns, but that he just needed addresses, as he could use fictitious names [R. T. 217-218].

Thereafter, several such returns were filed in which the names did not correspond with the social security numbers and the employers were either fictitious or had no record of such person being employed [Exhibits 21, 22 and 23].

The signatures upon all these returns were in appellant's handwriting and the typing was from typewriters to which appellant had access [R. T. 62-63 and 237-261].

IV

SPECIFICATION OF ERRORS

Appellant has alleged that the trial court committed the following errors.

1. Appellant was not furnished a copy of the indictment until the day before trial.

2. The Court erred in denying certain of appellant's pretrial motions.

3. The trial judge refused to disqualify himself from



sitting.

4. The Court erred in denying appellant's motion for a mistrial.

5. The Court erred in admitting Exhibits 21, 22 and 23.

6. The verdict was contrary to the weight of the evidence.

7. The Court erred in certain statements to the jury.

8. The Court erred in admitting Exhibit 11.

9. The Court erred in allowing the Government to re-open its case.

10. The Court erred in denying appellant's motion for a new trial.

V

ARGUMENT

A. APPELLANT WAS GIVEN A COPY OF THE INDICTMENT AT THE TIME HE WAS ARRAIGNED.

Appellant claims that he never received a copy of the indictment until December 3, 1962, one day before trial is plainly dispelled by the record. Appellant first appeared for arraignment on May 21, 1962. At that time the Clerk handed to appellant, personally, a copy of the indictment. [Reporter's Transcript of proceedings of May 21, 1962 before the Honorable William M. Byrne, United States District Judge.]



B. THE TRIAL COURT DID NOT ERR
IN DENYING APPELLANT'S PRE-
TRIAL MOTIONS.

1. Motion for Bill of Particulars.

On May 3, 1962, almost three weeks before his arraignment, appellant filed a motion for a "Bill of Particulars and Copy of the Indictment". The motion for a Bill of Particulars was denied [R. T. 354].

The motion merely asks for a Bill of Particulars and does not make any specific requests for information which the government might have furnished.

The granting of a motion for a bill of particulars is within the sound discretion of the trial judge.

Wong Tai v. United States, 273 U.S. 77 (1927);

Yeargain v. United States, 314 F.2d 881

(9th Cir. 1963);

Cooper v. United States, 282 F.2d 527

(9th Cir. 1960).

The purposes of a bill of particulars are to protect defendant against a second prosecution for the same offense and to enable the defendant to prepare so as to avoid surprise at trial.

Cooper v. United States, supra.

However, a bill of particulars, is not to enable the defendant to know all of the evidence which the government will use to prove the charge.



Wong Tai v. United States, supra.

The indictment in this case outlined with particularity the false claim which appellant was accused of filing. No claim was ever made that he thought he was defending a different charge than the government proved. The evidence of which he complains was other similar acts ^{4/} which tended to prove appellant's intent in doing the acts charged.

At the time this evidence was admitted, over objection, appellant made no motions for a continuance which would give him the necessary time to prepare to answer this evidence or to subpoena witnesses who might establish that he did not file these two claims. A failure to do so has been found to negate an allegation of surprise, even where raised at trial.

Cooper v. United States, supra.

Moreover, appellant has never contended that he did not file the additional returns.

2. Motion for Production of Material
for Inspection Prior to Trial.

On July 25, 1962, appellant filed a "Motion for Production of Material for Inspection Prior to Trial" [C. T. 18]. Such motion was made under Rule 17 of the Federal Rules of Criminal Procedure and Section 3500 of Title 18, United States Code,

^{4/} The government offered two other returns filed by appellant, Exhibits 12 and 13.



commonly referred to as the Jencks Act. In his motion, appellant requested Grand Jury Transcripts, statements of himself or his co-defendant and statements of government witnesses.

In its opposition to this motion, the government stated it would make available any statement of the appellant but declined on the basis of the Jencks Act to provide any witnesses' statements prior to trial [C. T. 34].

Appellant now contends that under Rule 16 of the Federal Rules of Criminal Procedure he was entitled to matter other than that he requested in his motion. Even assuming that such a request was made, there is nothing in the record in this case to show that the government had anything obtained by seizure or process or anything taken from the appellant or belonging to him as is required by Rule 16.

3. Refusal to Release Appellant on Bond.

At the time the indictment in the case was returned, appellant was serving a state sentence in San Quentin.

In order to arraign appellant and to try him, it was necessary to have him present in court. On July 27, 1962, the District Court, on application of the United States Attorney issued a Writ of Habeas Corpus Ad Prosequendum, compelling the state authorities to produce appellant for "hearing on motions and all other proceedings incident thereto" [R. T. 26].

It is appellant's contention that once appellant was brought



from San Quentin pursuant to the writ, he was no longer in state custody, but rather was in federal custody on this charge and eligible for release on bond.

This contention is, however, dispelled by the very terms of the writ, itself, which provides in part: "and at the termination of the proceedings against said defendant to return him to custody of said Warden, Sheriff or Jailor" [C. T. 26]. Clearly the writ did not release appellant from custody but only permitted appellant to be prosecuted in federal court while serving a sentence in state custody.

Moreover, as the trial court pointed out in its order denying appellant's motion to be released, in addition to the state sentence, appellant was committed to the custody of the Attorney General for five years as a result of a federal prosecution in the Northern District of California [C. T. 160]. This, in itself, would prohibit his release, as there is no indication that appellant had posted bond in that case.

4. Failure of the Court to Sign Order For Certain Jail Privileges.

At the time of trial appellant was in state custody confined in Los Angeles County Jail. The order which he submitted to the Court was never acted upon by the Court.

Prior to trial and while confined at County Jail, appellant filed numerous motions containing code and case citations. The

Court offered to subpoena any witness appellant wished to have testify. Moreover, one week prior to trial, appellant filed a motion for an immediate trial, which was denied because government counsel was engaged in trial on another matter [C. T. 53]. The Court also urged him to accept a Court appointed counsel. Just prior to trial appellant submitted a typed motion to disqualify the trial judge and during trial he submitted typed requested jury instructions.

Where a defendant in custody has refused the assistance of counsel, it should not be incumbent upon the Court to compel the prison authorities to make provisions to assist appellant in the preparation of his case. The Court did offer to subpoena any witness requested by appellant.

C. THE COURT DID NOT ERR IN FAILING
TO DISQUALIFY ITSELF FROM ACTING
AS THE JUDGE AT APPELLANT'S TRIAL.

Prior to trial appellant filed a motion discharging the trial court judge from hearing the case. The thrust of the motion was based upon the Court's denial of numerous pretrial motions.

Disqualification of a District Court judge for prejudice is governed by Title 28, United States Code, Section 144, which provides:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a



personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. "

A judge's prior adverse rulings are not a sufficient basis for disqualifying him.

Deitle v. United States, 302 F.2d 116

(7th Cir. 1962);

Freed v. Inland Empire Ins. Co., 174 F.Supp. 458

(D. C. Utah, 1959).

The motion itself failed to comply with the rules in that it failed to state that it was filed in good faith. As the Fifth Circuit stated in Beland v. United States, 117 Fed. 958 (5th Cir. 1941), at page 960:

"The courts have held that compliance with its every provision is essential * * * . The orderly administration of justice requires that affidavits filed under

the statute be strictly construed so as to prevent abuse, and that they state facts, not baseless conclusions, showing personal bias or prejudice of the judge against the affiant. "

D. THE COURT DID NOT ERR IN FAILING TO GRANT APPELLANT'S MOTION FOR A MISTRIAL.

Appellant claims that because co-defendant Michelson pleaded guilty to only two out of six counts, Michelson should have been required to be tried upon the other four along with appellant.

Michelson pleaded guilty to two counts the day before trial and the case against him was then continued to a later date for sentencing. After appellant made the motion for a mistrial, Michelson testified for the government. In the middle of his testimony, after the Court had upheld Michelson's right not to testify to certain matters to which he did not plead guilty, the government dismissed all the remaining counts against him.

The power of the court to conduct separate trials for two defendants jointly charged in the same indictment is found in Rule 14 of the Federal Rules of Criminal Procedure.

E. THE TRIAL COURT DID NOT ERR IN
ADMITTING EXHIBITS 21, 22 AND 23
OF THE GOVERNMENT.

These exhibits are statements of state and federal agencies showing the existence or non-existence of certain records. 5/

Appellant's sole contention is that the persons who made the search of the records should have been produced in court for cross-examination. The answer is twofold: (1) the presence of these persons is not necessary to lay a foundation for the documents, and (2) appellant could have brought them in as witnesses himself.

Rule 27 of the Federal Rules of Criminal Procedure provides as follows:

"An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions. "

Rule 44 of the Federal Rules of Civil Procedure provides in part:

5/ Exhibit 21 is a record of the California Department of Employment showing the non-existence of records for an employer listed on one of the returns.

Exhibit 22 is a record from the Department of Health, Education and Welfare showing that one of the Social Security numbers from one of the returns was non-existent and that another was for a different person than shown on the return.

Exhibit 23 is a record from the Navy Department showing that Robert E. Morgan was never employed by the Navy.



"(a) Authentication.

"(1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

* * *

"(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a) (1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a) (2) of this rule for a summary in the case

of a foreign record, is admissible as evidence that the records contain no such record or entry."

Appellant makes no contention that the Court failed to comply with these rules.

Moreover, prior to trial the Court offered to issue any subpoenas which the appellant requested [R. T. 31]. Appellant did not request subpoenas for any of the persons who conducted the record searches.

**F. THERE WAS SUFFICIENT EVIDENCE
 TO SUSTAIN THE CONVICTION.**

Appellant's argument in this specification of argument is essentially that since the exhibits which prove that the claims were false were not inadmissible, and since the persons in whose names the returns were filed were not called, the evidence is insufficient. It has already been shown that the evidence objected to was admissible in the preceding argument. This evidence alone establishes the falsity of the claims, for it shows that no persons with the names and social security numbers used existed and that no such employers were in existence in the State of California. Since there was no such person and no such employers, there was no one whom the government could call to say that he does not exist.

Furthermore, the testimony of co-defendant Michelson



establishes that appellant told Michelson that they could file fictitious returns [R. T. 218].

G. THE COURT DID NOT ERR IN ITS
INSTRUCTIONS TO THE JURY.

Appellant cites as error two statements made by the trial judge to the jury. The first alleged error relates to the Court's statement when it advised the jury that the Court had acquitted appellant on two counts and that the jury should not acquit appellant on the remaining counts for the reason that the Court had acquitted him on other counts. The second alleged error is that the trial judge forced a guilty verdict when, after the jury had returned a verdict on one count, leaving the other blank, he sent them back to the jury room for a verdict on the other count.

In both instances, these complaints arise for the first time on appeal. 6/ Appellant, who throughout the trial, exhibited no reluctance to offer objection where he thought appropriate, failed

6/ "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party shall assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." Rule 30, Federal Rules of Criminal Procedure.



to inform the Court, at the time when any possible misstatements could have been corrected, that there was a need to do so.

Reading all of the Court's instructions together, as the jury was instructed, 7/ there is nothing in either of the instructions of which appellant complains, that even suggests that the presumption of innocence or the burden of proof beyond a reasonable doubt were not applicable.

H. THE COURT DID NOT ERR BY
ADMITTING EXHIBIT #11.

Exhibit #11 is a photostatic copy of a short form income tax return, the original of which the government was unable to locate [R. T. 159].

An employee of the Internal Revenue Service testified that in the ordinary course of his duties he made a copy of the return, compared the two, and they were similar [R. T. 316].

Rule 27 of the Federal Rules of Criminal Procedure states:

"An official record . . . may be proved in the same manner as in civil actions."

Title 28 of the United States Code, Section 1732(b) reads in part:

"If . . . any department or agency of Government

7/ R. T. 421.



in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, . . . or other process which accurately reproduces or forms a durable medium for so reproducing the original. . . . Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial . . . proceeding whether the original is in existence or not. . . . "

I. THE COURT DID NOT ERR IN PERMITTING THE GOVERNMENT TO RE-OPEN ITS CASE AFTER THE MOTION FOR JUDGMENT OF ACQUITTAL HAD BEEN MADE.

It is within the sound discretion of the court to permit the government to re-open its case, after it has rested, for the purpose of offering additional evidence, even where such evidence constitutes a material element of the crime, without which there could be no conviction.

Haugen v. United States, 153 F.2d 850
(9th Cir. 1946);

United States v. Williams, 336 F.2d 183



(2nd Cir. 1964).

In the Haugen case, supra, after all parties had rested in a court trial, the court ruled that certain evidence was inadmissible, and stated that the result was the failure of the government to prove a material element of the offense. Five days later, the government moved to re-open its case to prove this element by other evidence. The court permitted this and convicted the defendant. This Court, in affirming the conviction, held that since there had been no acquittal, as yet, the trial court could allow the government to re-open.

J. THE COURT DID NOT ERR IN
DENYING APPELLANT'S MOTION
FOR A NEW TRIAL.

A motion for new trial is addressed to the sound discretion of the trial judge and should not be disturbed in the absence of an abuse thereof.

Straight v. United States, 263 F.2d 811

(9th Cir. 1959).

As heretofore shown, appellant has failed to establish that the trial court abused its discretion in denying the motion.

Appellant's grounds for claiming that the court erred in denying the motion for a new trial are the same as those already discussed. For that reason, they will not be discussed again in connection with this point.



VI

CONCLUSION

For the reasons herein stated, the conviction should be affirmed.

Respectfully submitted,

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United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ARTHUR I. BERMAN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.



CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Arthur I. Berman

ARTHUR I. BERMAN
Assistant U. S. Attorney



No. 19321

United States Court of Appeals
For the Ninth Circuit

NED EDWARD HETT, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

Dec 10 1935
Vol. 3310

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, *Judge*

PETITION FOR REHEARING

MURRAY B. GUTERSON,
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312 Hoge Building
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THE ARGUS PRESS



SEATTLE, WASHINGTON

FILED

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No. 19321

United States Court of Appeals
For the Ninth Circuit

NED EDWARD HETT, *Appellant*,

vs.

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THE WESTERN DISTRICT OF WASHINGTON,
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HONORABLE WILLIAM T. BEEKS, *Judge*

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18 U.S.C. 1073	1
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United States Court of Appeals

For the Ninth Circuit

NED EDWARD HETT,	<i>Appellant,</i>	} No. 19321
vs.		
UNITED STATES OF AMERICA,	<i>Appellee.</i>	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, *Judge*

PETITION FOR REHEARING

Appellant respectfully requests a rehearing. This petition is filed not as a matter of form or routine, but because our painstaking review of the opinion compels us to the conclusion that our principal constitutional point was somehow not fully communicated to and appreciated by the court. Before turning to this, however, we do wish to very briefly touch on three other points as follows.

We continue to feel that 18 U.S.C. 1073 is subject to only one reasonable construction, namely that the illegal flight must be alleged to have originated in the place seeking to prosecute the one in flight. Likewise, we continue to feel that no substantial evidence was presented making a rational connection between the movements of Young from March 8 through March 28, 1963 with a Kirkland, Washington grocery store robbery of December 1, 1962. And, also, we still believe that whatever evidence there was on the question of Young's motive for his travels should have been measured by the test of *the* dominant motive and not *a* dominant motive.

Notwithstanding our continuing belief in the propriety of these three points we are, we think, wise enough to realize that the court has understood what we argued and chosen

to reject our contentions. Quite frankly, if this was all we read in the opinion of November 18, 1965, then this petition would not be presented, and we would instead be already preparing our petition for certiorari.

But this is not all; to the contrary, we are tremendously troubled by the Fifth Amendment point we presented and the court's reaction to it; both by what the court wrote about this point and what the court did not write. If we understand the court's opinion, at page 5 thereof, the court is saying (1) that the claim of privilege against self-incrimination as made by Young and Tichenor during cross-examination was valid; (2) that the previous testimony of each did not cause either to waive the right to assert the privilege; and (3) it was not error to refuse to strike any or all of the direct testimony of either when the assertion of the privilege was upheld during cross-examination. What the court does *not* say is whether it found the cross-examination to be either germane or collateral to the issues in Hett's case and if, as we feel everyone agrees, germane, then why it upheld the refusal to strike. This was the crux of both our written and oral argument on this point, and we are gravely distressed that somehow we were totally misunderstood.

Before turning to this question, however, we do wish to make the following observation. We agree that the claim of privilege was valid either for reasons advanced by the Government at trial and most certainly under *Murphy v. Waterfront Commission*, 378 U.S. 52, as cited by the court, *if there was no waiver*. *Murphy v. Waterfront* has no bearing on the waiver question. But here there was a waiver, and any objective reading of the record so shows.

We earnestly beseech the court to read pages 644-655 of the transcript where Young on direct examination tells of a trip on March 4, 1963 to Seattle and some details of his stay and departure on March 8, 1963, and then read pages 702-707

where, on cross-examination, he is permitted to refuse to tell the other and really crucial details thereof insofar as Hett's case is concerned. Then also contrast the without reservation redirect examination on pages 751-754 with the assertion of privilege which was upheld on recross-examination at pages 765, 766, 772, and 774.

For the court to say the waiver question was "a close one," but to discard it on the theory that the questions concerned Count I only is totally inaccurate. What the trial was all about was to ascertain whether a dominant connection existed between a Kirkland, Washington robbery of December 1, 1962 and travels of Young from March 8 to March 29, 1963. To say questions concerning March 4 or March 5 relate only to the March 8 trip and not to the March 22 trip charged in Count III is unreal and inaccurate, particularly when we bear in mind that the court's opinion indicates no problem in connecting the trip of March 22, 1963 all the way back to December 1, 1962. There was, in fact, a clear waiver here as to questions which affected all counts, not simply Count I.

The rule in this court clearly supports a finding of waiver. See *Semler v. United States*, 332 F.2d 6, 7 (9th Cir. 1964) where the rule was stated that waiver turns on whether or not the cross-examination is on a subject gone into on direct examination. All we ask is that the court apply its own rule to this question.

Now, we return to what we believe to be the most crucial point, i.e., a valid fear of some or many prosecutions gives rise to a valid claim of privilege which for the sake of argument we will now say had not been waived. So what do we do when Young asserts the privilege. The answer turns on *U.S. v. Cardillo*, 316 F.2d 606 (2nd Cir. 1963). We respectfully refer the court's attention to page 611 of that opinion which we set out in detail at page 36 of our opening brief.

Simply, the rule is that we must determine whether the

privilege was upheld as to questions which were germane or, on the other hand, merely collateral to the issues in the case on trial. Nowhere in the court's opinion, here, is there even any intimation that this singularly crucial point was considered.

Of course, *Cardillo, supra*, holds that if the privilege is sustained to questions germane to the matter on trial then you must strike the direct testimony; if as to questions merely collateral to the issues in the trial, then nothing need be done. The vitality of this rule is amply demonstrated at page 613 of *Cardillo, supra*, where reversal is ordered because of failure to strike direct testimony when the cross-examination to which the privilege was asserted and upheld was very nearly only an attack on credibility of the witness. The point is that this is a most zealous right and, here, in Hett's case, the court's opinion shows it was not even considered. Since *Cardillo*, the following cases have been decided, all of which reiterate that the *Cardillo* approach to the problem is the only proper one and must be the approach taken: *Smith v. U.S.*, 331 F.2d 265 (8th Cir. 1964); *U.S. v. Smith*, 342 F.2d 525 (4th Cir. 1965); and *Coil v. U.S.*, 343 F.2d 573 (8th Cir. 1965).

Each of these cases illustrate this approach of the court concerning itself first with the direct examination, then the cross-examination, and then ascertaining (in the aforementioned cases) the cross-examination to be merely collateral as directed solely toward the witness's credibility. Our case, of course, is just the opposite, because none of the questions were in the nature of attacks on Young's credibility. Instead, every question was directed to the "why" of Young's movements on the very dates involved in Hett's trial. What could be more germane?

Not only does the court omit any discussion of this point but so does the Government's brief. No suggestion is made

anywhere that the privilege was claimed on collateral matters only. And, certainly, the court's opinion itself most clearly demonstrates that the trip of March 22, 1963 relates to the robbery of December 1, 1962, and thus any probing of activities from March 4 to 8, 1963 is clearly germane to Count III, as well, of course, as being germane in the sense of not simply attacking Young's character.

So again what we urge is that the Ninth Circuit adopt the same rule as the Second, Fourth, and Eighth Circuits, apply this rule, and then state what has to follow from such application. So far the court here has been silent about this basic matter, and this, primarily, is why in this case, unlike so many others, a rehearing is absolutely necessary.

For the reasons as set out above, appellant respectfully petitions this Court to rehear this matter.

Respectfully submitted,

MURRAY B. GUTERSON,
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I certify that in my judgment this petition for rehearing is well founded and further that it is not interposed for purpose of delay.

MURRAY B. GUTERSON, *Attorney.*



No. 19325 ✓

**In the United States Court of Appeals
for the Ninth Circuit**

SAFEWAY STORES, INCORPORATED; CONTINENTAL BAKING
COMPANY; LANGENDORF UNITED BAKERIES, INC.; HANSEN
BAKING COMPANY, INC., RICHARD HOYT; BUCHAN BAKING
Co., AND GEORGE B. BUCHAN, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE
COMMISSION

REPLY TO MEMORANDUM OF CONTINENTAL BAKING COMPANY
RE APPLICABILITY OF FLOTILL PRODUCTS, INC. v. FEDERAL
TRADE COMMISSION

RECEIVED

APR 19 1966

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In the United States Court of Appeals for the Ninth Circuit

No. 19325

SAFEWAY STORES, INCORPORATED; CONTINENTAL BAKING
COMPANY; LANGENDORF UNITED BAKERIES, INC.; HANSEN
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v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE
COMMISSION

REPLY TO MEMORANDUM OF CONTINENTAL BAKING COMPANY
RE APPLICABILITY OF FLOTILL PRODUCTS, INC. v. FEDERAL
TRADE COMMISSION

In a memorandum dated April 4, 1966, Continental Baking Company argues that the decision in *Flotill Products, Inc. v. Federal Trade Commission*, CCH 1966 Trade Cases, ¶ 71,720 (9th Cir. 1966), applies to this proceeding and requires, or may require, that it be remanded to the Commission. *Flotill* held that "an order of the Commission must be supported by three members in order to constitute an enforceable order of the FTC."

We submit that the argument of Continental is not well taken, and that the *Flotill* decision has no applicability to this case. The order here, directing petitioners to cease and desist from fixing bread prices, was issued by a 3 to 1 vote (R. II,

813, 866), not by a 2 to 1 vote as in *Flotill*. Hence it was "supported by three members," exactly as held to be required by *Flotill*.

After issuance, the effectiveness of this order was stayed pending proceedings on remand, and this was done because of the request of Continental (R. II, 873). The Commission, on May 28, 1964, directed that (R. II, 882):

* * * the effective date of the Commission's decision and order of February 28, 1964, be, and it hereby is, stayed pending the proceedings on remand * * *

Continental had petitioned for an opportunity to rebut certain facts officially noticed by the Commission, about the internal management of Continental's interstate bread business, in deciding the so-called "commerce" question in this case (R. II, 830-836).

After the record had been reopened for this limited purpose (R. II, 877), and returned to the Commission, it was concluded by a 2 to 1 vote that Continental had not in most particulars shown the contrary of the facts officially noticed. It was then directed, on December 3, 1964, that (R. II, 985):

* * * the order to cease and desist issued February 28, 1964, be, and it hereby is, made effective * * *

The 2 to 1 decision, after remand, in substance only amounted to a redetermination that, notwithstanding the contentions of Continental on remand, Continental's bread sales in Washington were in interstate commerce. No new cease and desist order was issued, the original order supported by a 3 out of 4 majority was merely put into effect.

Moreover, it is clear that the record in this case, entirely apart from the officially noticed facts and the proceedings on remand, was sufficient to establish that the price fixing activities of petitioners in Washington, including those of Continental, were in interstate commerce. Continental stipulated in the case-in-chief that in 1960 it sold \$350,000,000 worth of bread and other bakery products in 60 cities and 29 states, that it was regularly engaged in interstate commerce in the sale and distribution of bread and other bakery products, that its coast-to-coast baking business was conducted on an *inte-*

grated basis, that purchasing was done at headquarters in New York, that all receipts went into a *single treasury*, that ultimate responsibility for company affairs was centralized in New York, that *each element of its bread and bakery business was part of an integrated whole*, that Continental was a single entity, that Continental in its whole business *benefited* by what was done by its individual bakeries and its local officials, such as those in Washington, and that New York headquarters of Continental approved membership in Bakers of Washington, Inc. (R. I, 304-305).

This Court in *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F. 2d 851, 860-861 (9th Cir. 1965), decided after the Commission's decision was issued and after its brief in this Court was prepared, recognized that where such facts existed, acts and practices within a state were in interstate commerce and subject to the jurisdiction of the antitrust laws. In *Rangen* this Court, applying the rationale of *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), ruled (p. 861):

Critical here is the fact that Rangen's payments to Grimes gave it a definite advantage in its own interstate dealings—the "beneficiary" was its interstate business—and therefore the payments must be regarded as having been made in the course of its own interstate commerce.

The price fixing activities of Continental in Washington, of course, gave it an advantage in its interstate bread business. The beneficiary was Continental's interstate business in which it was better able to compete because of the price fixing activities within Washington. This Court accordingly can sustain the cease and desist order issued by the 3 out of 4 majority of the Commission without relying upon the officially noticed facts, or upon the ruling after remand that Continental had failed to controvert such facts. Indeed, Continental appears to admit this (Memorandum, p. 3).

It is relevant to note that until now Continental never saw any error in the termination of the stay and the effectuation of the original order, after remand, by a 2 to 1 vote. It is now claimed for the first time, after all briefs have been filed, and

oral argument had, that this procedure was fatally defective. This alleged error patently is being raised at this late date because of the fortuitous occurrence, so far as Continental is concerned, of the *Flotill* decision. It is also relevant to note that Continental in its memorandum of April 4, 1966, in effect "wants to have its cake and eat it, too." Continental only advocates the application of *Flotill* to this case in the event that Continental loses on the merits. Continental wants this Court to undertake a decision on the merits. If it should appear, however, that the Commission's order is to be sustained, Continental then wants the entry of the decision to be shelved, *Flotill* ruled applicable, and the entire case remanded to the Commission.

We submit that such handling would be incorrect and unfair. The Court should first decide whether Continental can properly raise, at this time, the question of the effectuation of the original order, after remand, by a 2 to 1 vote. Only if this is determined to be proper should the question of the applicability of *Flotill* be taken up.¹

For the foregoing reasons we believe *Flotill* has no application to this case, and a decision on the merits should be made.

Respectfully submitted,

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WASHINGTON, D.C., 20580.

¹ The Commission has filed a petition for rehearing in the *Flotill* case, suggesting a rehearing *en banc*.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CONTINENTAL BAKING COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR REVIEW AND FOR DECREE SETTING ASIDE OR
MODIFYING ORDER OF THE FEDERAL TRADE COMMISSION

PETITION FOR LIMITED REHEARING EN BANC

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Continental Baking Company

October 14, 1966

FILED

OCT 13 1966

WM. B. LUCK, CLERK

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 19,325

CONTINENTAL BAKING COMPANY, *Petitioner*,
v.
FEDERAL TRADE COMMISSION, *Respondent*.

*PETITION FOR REVIEW AND FOR DECREE SETTING ASIDE OR
MODIFYING ORDER OF THE FEDERAL TRADE COMMISSION*

PETITION FOR LIMITED REHEARING EN BANC

STATEMENT OF REASONS FOR GRANTING PETITION

This petition is addressed to the opinion of this Court, dated September 14, 1966, affirming a Federal Trade Commission Cease and Desist Order issued under Section 5 of the Federal Trade Commission Act. Grounds for the petition are (1) that the Court has transgressed the important principle of administrative law that agency orders can only be affirmed on the grounds relied upon by the agency, and (2) that the September 14 opinion is flatly contrary to applicable Supreme Court precedent defining the scope of the Federal Trade Commission Act. Both questions are of substantial public importance.

1. This Court Is Without Authority to Affirm an Agency Decision on Grounds Other Than Those Relied Upon by the Agency.

Section 5 of the Federal Trade Commission Act provides that "unfair methods of competition in commerce are hereby declared unlawful." 15 U.S.C. § 45 (1964). "Commerce" as defined in Section 4 of the Act in relevant part "means commerce among the several states or with foreign nations" 15 U.S.C. § 44 (1964).

The complaint in this proceeding alleged a conspiracy among some sixty-three persons and firms in and around Seattle, Washington. The Commission held that the alleged local Seattle conspiracy was "in commerce" because of the multistate character of certain of the respondent companies such as Continental. The Court's opinion of September 14 expressly disavowed reliance upon this theory of jurisdiction, however, and instead held that certain sales made by a few of the respondents to distributors in Seattle who in turn ship bread to Alaska were sufficient to bring the alleged Seattle conspiracy within the terms of the Act.

The Court's entire analysis and holding appears in one paragraph of its decision:

“The Alaskan sales were not wholly unrelated to the activities which the FTC seeks to prevent. The prices received for these sales, sales which were clearly made ‘in commerce’, were determined in the same manner as sales made in the State of Washington. While it may be that the petitioners intended that their activities affect only those sales made within the State of Washington, the effect was otherwise.”

In its turn, the Commission had expressly disavowed reliance upon these Alaska sales. The Commission had held, referring to the Alaska sales, that

“... this case involves a much larger problem. We think it not only important *but necessary* that we deal with the question of whether these great interstate firms can claim immunity from the statutory prohibition against price fixing in regard to the remaining 99 per cent of the transactions involved, those that took place within the borders of the State of Washington.” [Emphasis added.] (R. V. II, p. 821).

In accordance with this finding of necessity the Commission admitted that its record did not support the broad order it was issuing and went on to take official notice of facts not in the record. The Commission never said whether this unusual action was “necessary” because an Alaska finding would lack any evidentiary support,* or because the complaint did not contain due notice of such a charge since it

* The Commission alleged a sixty-three member conspiracy which obviously had no interest in the minuscule sales to the Alaska shippers. Not only was there no evidence offered of any collusion on those sales but, in spite of the assumptions of fact made in the Court’s dispositive paragraph, there is no evidence whatever of what Continental’s prices were to shippers to Alaska, nor any evidence of Buchan’s prices, nor Hansen’s, nor when and if they changed, nor whether any discounts were quoted, etc., and there is, moreover, no evidence whatever that these prices were affected by the alleged Seattle conspiracy. (See Petitioner Continental’s Reply Brief, pp. 4-5).

contained no mention of anything respecting Alaska, or because standard rules of law prohibit a finding of a four man conspiracy on a charge of a sixty-three man conspiracy, or because a narrow finding on Alaska would not in its judgment support the broad order that was issued. Whatever the reason, the fact is the Commission's order does not purport to rest on the sales to the Alaska trade, and this is the only basis the Court rested its affirmance on.

The legal principle violated by this Court's affirmance of an agency order on grounds different than those relied upon by the agency is stated in the leading case of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). The holding of the Supreme Court in this case is stated in one sentence: "We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which the action can be sustained." 318 U.S. at 95.

The holding of *Chenery* as applied to the case at hand is simply that the agency's order cannot be affirmed absent an affirmance by this Court of the Commission finding that the method of competition alleged in Seattle was "in commerce" because of the multi-state character of some of the respondents. For the reasons already argued to the Court, and as to which the September 14 decision contained no opinion, we submit that such a finding is legally impermissible.

2. Section 5 of the Federal Trade Commission Act Requires a Showing of Unfair Acts or Practices Which Are Actually in Interstate Commerce.

The second legal error in the September 14 opinion also stems from the Court's reliance upon the Alaska sales for jurisdiction. As noted, the Act provides that "unfair methods of competition in commerce" are unlawful. The Supreme Court has explicitly held that this language means what it says; *i.e.*, that "un-

fair methods of competition in [interstate] commerce” does not mean “unfair methods of competition in any way affecting interstate commerce.” *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 355 (1941).

The September 14 opinion, in the paragraph quoted above, holds that the alleged Seattle conspiracy violated Section 5 because it “affected” prices on sales to dealers for shipment to Alaska made by a few of the sixty-three alleged co-conspirators. As such, the decision is squarely in conflict with the Supreme Court’s holding in *FTC v. Bunte Bros., Inc.*, *supra*, which is the leading case on the scope of Section 5, and a case not even cited in the September 14 opinion.

In *Bunte Bros., Inc.*, the Commission tried to prohibit intrastate activities of a firm on the theory that they were in commerce because they “affected” commerce. The analysis of the Supreme Court is fully stated in two brief excerpts from its opinion:

“While one may not end with the words of a disputed statute, one certainly begins there. ‘Unfair methods of competition in commerce’ are the concern of § 5, and the Commission is ‘directed to prevent persons . . . from using unfair methods of competition in commerce . . .’ The ‘commerce’ in which these methods are barred is interstate commerce.” 312 U.S. at 350-51.

“... we merely hold that to read ‘unfair methods of competition in [interstate] commerce’ as though it meant ‘unfair methods of competition in any way affecting interstate commerce,’ requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished.” *Id.* at 355.

Bunte Bros., Inc., remains the definitive statement of the scope of Section 5. It has never been overruled, superseded, or limited by any subsequent decision.

CONCLUSION

The dispositive paragraph of the Court's decision thus not only articulates a legal theory expressly rejected by the Supreme Court, but also affirms, contrary to Supreme Court command, on a basis upon which the Commission was either unable or unwilling to rely.

The Court's opinion is of substantial public importance as it would expand significantly the hitherto established reach of Section 5 of the Federal Trade Commission Act. It is, moreover, of significant concern to Continental Baking Company for, alone among its multistate competitors, Continental would be subject to a broad Commission order. (Even those few named in the order have since been acquired by others.) It is no answer to say the order would only require adherence to the law. It would do much more. It would subject Continental in perpetuity to recurrent Commission compliance demands as to which there is no effective relief. In addition, if the Court should sign the order submitted by Commission counsel, Continental would unlawfully be continually exposed to proceedings for contempt of this Court.

We respectfully submit that the legal errors underlying the September 14 opinion require reconsideration by the full Court.

Respectfully submitted,

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GORDON A. THOMAS

*Continental Baking
Company*

October 14, 1966

Certificate

I certify that this Petition for Limited Rehearing
En Banc is well-founded and not interposed for delay.

JAMES V. SIENA

**United States Court of Appeals
For the Ninth Circuit**

SAFEWAY STORES, INCORPORATED, *Petitioner,*

vs.

FEDERAL TRADE COMMISSION, *Respondent.*

**PETITION FOR REHEARING OF
PETITIONER SAFEWAY STORES, INCORPORATED**

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FILED

OCT 12 1966

WM. B. LUCK, CLERK

United States Court of Appeals
For the Ninth Circuit

SAFEWAY STORES, INCORPORATED, *Petitioner.*

VS.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR REHEARING OF
PETITIONER SAFEWAY STORES, INCORPORATED

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United States Court of Appeals
For the Ninth Circuit

SAFEWAY STORES, INCORPORATED,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

No. 19325

PETITION FOR REHEARING OF
PETITIONER SAFEWAY STORES, INCORPORATED

Petitioner respectfully petitions the Court for a rehearing and reconsideration of its decision filed herein on September 14, 1966, and requests that this case be reheard en banc for the reasons set forth below:

I.

Assuming (a) that the record before the Commission permitted a finding of participation in a price fixing conspiracy by members of Bakers of Washington, Inc. and by petitioners other than Safeway; assuming (b) that the record warrants the finding that Bakers' secretary participated in conspiratorial price fixing activities on behalf of members of Bakers; and assuming (c) that "the existence of the [Safeway] price differential did not compel the Commission to find that Safeway was not a conspira-

tor" (Opinion, page 8), the Court erred in sustaining the finding of the Commission that Safeway participated in the conspiracy for the following reasons:

1. The Court concludes (Opinion, page 9) "that there was substantial evidence to support findings that each of the petitioners [including Safeway] participated".

2. The evidence of record — and the only facts referred to by the Court — upon which a finding of participation by Safeway can be predicated are: "the record reveals that Safeway directly paid to Bakers' secretary the sum of \$600 per year, an amount equivalent to the maximum dues charged for Bakers' members". The only evidence of record affirmatively establishes that this payment was paid for representation of Safeway in its labor matters (Tr. 120). This evidence of record is not contradicted — it is not simply a "claim" by Safeway.

3. The Court's conclusion "that there was evidence which, with its inferences, was sufficiently substantial to support a determination" that Safeway participated in conspiratorial activity is erroneous as a matter of law:

(a) The total evidence referred to in paragraph 2 above does not support such a determination.

(b) There are no permissible inferences which may be drawn from such evidence that support a determination of conspiratorial participation by Safeway.

4. The Court's observation that "while Safeway claimed that the consideration was the secretary's individual rep-

resentation in its labor matters, the Commission was free to infer otherwise" is erroneous as a matter of law:

(a) The only evidence of record, which is not contradicted, is that Safeway's payment was made exclusively for work on labor matters. (Tr. 120)

(b) The participation by Bakers' secretary in conspiratorial price fixing activities on behalf of members of Bakers does not permit the drawing of an inference that Safeway paid for or authorized conspiratorial price fixing activities on its behalf. (See Tr. 98, 119)

5. Safeway is entitled to a determination as to its participation in conspiratorial activity based upon the factual record before the Commission — not upon the freedom of the Commission to draw inferences as to Safeway's participation which do not find support in the facts of record.

II.

Petitioner cannot be deemed to have waived the failure of the Commission to observe due process in the purported process of taking official notice of facts assertedly established in another proceeding, Docket No. 7630.

(a) Assuming that petitioner may be deemed to have waived objections to a failure of the Commission to follow the statutory requirements of Section 7(c) and 7(d) of the Administrative Procedure Act, 5 U.S.C. § 1006(c), (d) as stated by the Court (Opinion p. 11), this petitioner cannot be deemed to have waived failure to ac-

cord to it due process in the determination which resulted in the order against it. For reasons set forth at pages 33-40 of this petitioner's brief herein, this denial of due process cannot be obviated by reference to Section 1006(d) of the Administrative Procedure Act and its provisions for affording petitioner the opportunity of showing the contrary of the noticed facts. Failure to accord petitioner procedural due process under the 4th Amendment is not subject to waiver.

(b) A holding to the contrary is squarely contradictory of the decision of the Court of Appeals for the Sixth Circuit in *Dayco Corp. vs. Federal Trade Commission*, decided June 17, 1966, 362 F(2d) 180, where this precise point was ruled upon and where the Court observed with respect to the use of official notice: "due process must be observed in such use". (362 F(2d) at 185. The fact that the petitioner there "declined to put in any evidence in an attempt to disprove the case the F.T.C. had made" by use of official notice was deemed to be immaterial. (362 F(2d) at 185).

III.

Petitioner, Safeway Stores, Incorporated, adopts and incorporates by this reference the petition for rehearing filed herein on behalf of petitioner Continental Baking Company.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this petition, I have examined Rules 18, 19 and 23 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing petition is in full compliance with those rules. I further certify that in my judgment this petition is well founded and that it is not interposed for delay.

ROBERT W. GRAHAM

GEORGE CONSTABLE

Attorney

October 10, 1966

**United States Court of Appeals
For the Ninth Circuit**

LANGENDORF-UNITED BAKERIES, INC., HANSEN BAKING
COMPANY, INC., and RICHARD HOYT, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

**PETITION FOR REHEARING OF LANGENDORF-
UNITED BAKERIES, INC., HANSEN BAKING
COMPANY, INC. AND RICHARD HOYT**

FILED
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**United States Court of Appeals
For the Ninth Circuit**

LANGENDORF-UNITED BAKERIES, INC., HANSEN BAKING
COMPANY, INC., and RICHARD HOYT, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

**PETITION FOR REHEARING OF LANGENDORF-
UNITED BAKERIES, INC., HANSEN BAKING
COMPANY, INC. AND RICHARD HOYT**

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United States Court of Appeals
For the Ninth Circuit

LANGENDORF-UNITED BAKERIES, INC.,
HANSEN BAKING COMPANY, INC., and
RICHARD HOYT, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent,*

No. 19325

**PETITION FOR REHEARING OF LANGENDORF-
UNITED BAKERIES, INC., HANSEN BAKING
COMPANY, INC. AND RICHARD HOYT**

The above entitled petitioners hereby respectfully petition this court for a rehearing and reconsideration of its decision filed herein on September 14, 1966, and request that this case be reheard en banc.

In order to avoid unnecessary repetition, these petitioners hereby adopt and by reference hereby make the grounds and reasons set forth in the petitions of Continental Baking Company and Safeway Stores Incorporated a part of this petition as though the same were set forth herein in full.

Respectfully submitted,

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Seattle, Washington
October 13, 1966

CERTIFICATE

The undersigned hereby certifies that in connection with the preparation of this petition I have examined Rules 18, 19 and 23 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing petition is in full compliance with those Rules. I further certify that in my judgment this petition is well founded and that it is not interposed for delay.

HERBERT S. LITTLE
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United Bakeries, Hansen Baking
Company, Inc. and Richard Hoyt

1 1

See
also
Vol. 321

Nos. 19,373 and 19,374
United States Court of Appeals
For the Ninth Circuit

JOSEPH A. MAUN, as trustee, 1962 trust
for Alys Wunderlich Bachler, Town
OF WOODSIDE, et al., *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

No. 19,373

WILLIAM J. ADAMS and JANET K. ADAMS,
et al., *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

No. 19,374

Appeal from the United States District Court for the
Northern District of California,
Southern Division

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JAN 17 1966

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Nos. 19,373 and 19,374

United States Court of Appeals
For the Ninth Circuit

JOSEPH A. MAUN, as trustee, 1962 trust
for Alys Wunderlich Bachler, TOWN
OF WOODSIDE, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 19,373

WILLIAM J. ADAMS and JANET K. ADAMS,
et al.,

Appellants

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 19,374

**Appeal from the United States District Court for the
Northern District of California,
Southern Division**

APPELLANTS' BRIEF

INTRODUCTION

“For over three centuries the beauty of America has sustained our spirit and enlarged our vision. We must act now to protect this heritage. In a fruitful new partnership with the states and cities the next decade should be a conservation milestone. We must make a massive effort to save the countryside and establish—as a green legacy for tomorrow—more large and small parks, more seashores and open spaces than have been created during any period in our history.”

*The President of the United States, January 4,
1965.*

STATEMENT OF QUESTIONS INVOLVED

Does the AEC have power to determine the character and location of an electric power line used in local distribution or for the transmission of electricity in intrastate commerce?

Does the AEC's lack of power to determine the character and location of an electric transmission line used in local distribution or for the transmission of electricity in intrastate commerce prevent the United States from condemning property for such use at the Commission's request?

I**JURISDICTION**

Jurisdiction of the subject matter of these actions was conferred upon the District Court by 28 USCA Sec. 1358.

Jurisdiction of these appeals is conferred upon this Court by 28 USCA Sec. 1292(b).

II**STATEMENT OF THE CASE**

Plaintiff United States of America instituted two civil actions (in this court, Nos. 19373 and 19374) for the condemnation of a strip of land, 100 feet in width and approximately 2½ miles long, for the purpose of

constructing thereon an overhead 220,000 volt electric transmission line to serve the Stanford Linear Accelerator Center.

In No. 19373, the government sought to condemn 4.92 acres of the route located within the Town of Woodside; in No. 19374, 24.57 acres of the route through unincorporated lands of the County of San Mateo.

Various defendant property owners and the Town of Woodside filed answers, motions to dismiss and/or motions for summary judgment. The government filed motions to strike the defendants' motions and all defenses raised in their respective answers. Pursuant to stipulation, the two cases were consolidated and all issues submitted to the court on June 5, 1964. At such hearing it was further stipulated that all factual matters raised in support of defendants' motions for summary judgment would be considered as raised by way of answer.

Plaintiff's motions to strike were granted on June 12, 1964, the order being thereafter amended on June 17, 1964, to include a finding intended to bring such order within the provisions of 28 USCA Sec. 1292(b) providing for appeals from interlocutory orders in certain cases. Petitions for leave to appeal were filed, and granted by this Court.

Appellants, including the Town of Woodside, appeal from the order granting plaintiff's motions to strike their motions and defenses and from denial of their motions for summary judgment.

From the pleadings and affidavits of defendants, unchallenged by the government, it appears that the Atomic Energy Commission (AEC) filed the condemnation actions in question for the express purpose of overriding local regulation of the transmission of electricity by the Town Council of the Town of Woodside and the Board of Supervisors of the County of San Mateo.

The defenses of defendants were predicated on the contention that the Atomic Energy Commission was without jurisdiction or power to override local regulation of electric transmission lines by virtue of the Federal Power Act of 1935, and Title 42 USCA, Section 2018, originally enacted as Section 271 of the Atomic Energy Act of 1954. Section 2018, entitled "Agency Jurisdiction," reads as follows:

"Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale or transmission of electric power."

Construction of the Stanford Linear Accelerator was approved by Congress in 1961¹ at an estimated cost of \$114,000,000. The power supply for the Accelerator was to come from an electric transmission line constructed by Pacific Gas and Electric Company (P. G. & E.) to the Accelerator.²

¹Public Law 87-315; 75 Stat. 676 §§ 101 and 107, Sept. 26, 1961.

²Hearings before the Subcommittee on Research and Development and the Subcommittee on Legislation of the Joint Committee on Atomic Energy (1959):

At page 421: "1. Main Feeder. The Pacific Gas and Electric Company has studied the problem of bringing power to the Proj-

On January 10, 1963, the AEC and P. G. & E. entered into a written contract for the supply of power to the Accelerator over a 220,000 volt line to be constructed by P. G. & E. through the Town of Woodside and County of San Mateo.³ Such contract contained a recital that it was executed under the Atomic Energy Act of 1954, as amended, and that it was subject to the approval and regulation of the California State Public Utilities Commission.³ AEC Chairman Glenn Seaborg admitted that AEC was "acting as a customer for electrical energy."⁴

The Town of Woodside's zoning ordinance requires, and had for many years, a use permit for power lines of this type.⁵ The County of San Mateo had a similar ordinance.⁶

The Town of Woodside is one of four communities surrounding the lands of Stanford University where the Accelerator is situated, all of which have ordi-

ect M site. They propose to bring in two lines (one from Los Altos and one from Menlo Park) at a voltage of 66 KV. At the main substation the voltage will be reduced to values suitable for transmission in underground cable."

At page 470: "Stanford University proposes to construct a two-mile linear electron accelerator at a site adjacent to the University Campus on Stanford-owned land."

At page 480: "1. Main power supply is from a single 110 KV line from the P. G. & E. Monta Vista substation."

³Affidavit in Support of Motion to Dismiss, Paul N. McCloskey, Jr. (R. Vol. 1, p. 28.)

⁴Letter of Glenn Seaborg, Chairman of AEC, to Donald Graham, Mayor of Woodside, March 7, 1964, page 1 (Exhibit A, Graham Affidavit, April 14, 1964). (R. Vol. 1, p. 31, 32.)

⁵Woodside Ordinances No. 1959-80, page 17, Sections 10.3(e) and (f); pages 28-29, Section 20.4; filed herein with defendants' Motion to Dismiss, April 13, 1964. (R. Vol. 1, p. 41 et seq.)

⁶Declaration of Donald Graham, Mayor of Woodside, May 22, 1964. (R. Vol. 1, p. 66.)

nances requiring transmission lines to be placed underground.⁷

A California public utility such as P. G. & E., holding a franchise from a municipality, is required to adhere to local ordinances regulating electric transmission lines.

For instance, P. G. & E. holds a franchise from the Town of Woodside⁸ and has filed its Rule 15 D(1)(a)⁹ with the California Public Utilities Commission, indicating its obligation to comply with applicable ordinances requiring underground construction.

P. G. & E., acting as an agent for the AEC, sought to obtain appropriate use permits for the transmission line from both the Town and County. The permit applications were denied, the local governments requiring that the line be put underground.¹⁰

A feasible underground route to serve the Accelerator exists through Woodside and the County, and was acceptable to the AEC,¹¹ provided that the additional

⁷Copies of ordinances of Menlo Park, Palo Alto and Los Altos Hills, appended as Exhibits A, B and C to Declaration of Donald Graham, May 22, 1964. (R. Vol. 1, pp. 75-80.) See also map of the Linear Accelerator site and surrounding municipalities. (R. Vol. 1, following p. 80.)

⁸Declaration of Donald Graham, May 22, 1964. (R. Vol. 1, p. 66.)

⁹Exhibit E, Declaration of Graham, May 22, 1964. (R. Vol. 1, following p. 74.)

¹⁰See Minutes, Board of Supervisors of San Mateo County, April 21, 1964, Exhibit F, 4 pages (following R. Vol. 1, p. 74).

¹¹"We are prepared to go along with an underground line notwithstanding the fact that the interests of the project would be better served by an overhead installation," *Letter, Seaborg to Graham*, March 7, 1964. (R. Vol. 1, p. 37.)

construction costs of the underground line were not reflected in charges made by P. G. & E. to the AEC. The California Public Utilities Commission requires that the customer of electric energy bear the increased costs of underground construction (see *City of Walnut Creek v. P. G. & E.*, 60 P.U.C. 223, Jan. 8, 1959, Doc. No. 58551, Case No. 61730). AEC admittedly filed the subject condemnation actions rather than pay the additional charges required by P. G. & E. under existing California law. Thus AEC seeks to achieve by the power of eminent domain what it would otherwise be precluded from doing as a customer for electric energy, i.e., overriding local regulation of electric transmission.

III

THE AEC DOES NOT HAVE POWER TO DETERMINE THE CHARACTER AND LOCATION OF AN ELECTRIC POWER LINE USED IN LOCAL DISTRIBUTION OR FOR THE TRANSMISSION OF ELECTRICITY IN INTRASTATE COMMERCE.

A. Congress has established "a hands-off" policy with respect to local regulation of electricity.

In *Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927) the Supreme Court had excluded the states from the regulation of interstate commerce in electricity.

Congress acted in 1935 to resolve the problem thereby created, enacting the Federal Power Act. Section 201(a) of the Act specifically declared that federal regulation was to extend only "to those matters

which are not subject to regulation by the States.” (Title 16 USCA, Section 824(a).)

Section 824(b) provides, in pertinent part, as follows:

“The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission [Federal Power Commission] shall have jurisdiction over all facilities for such transmission or sale of electric energy, *but shall not have jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electricity in intrastate commerce . . .*” (Emphasis added.)

The effect of this legislation has been characterized as follows:

“The Federal Power Act rests upon the concurrent powers of the Federal and state governments . . . The Act clearly indicates that Congress in an attempt to wipe out ‘twilight zones’ intended to *supplement* rather than supplant state regulation. Federal regulation was extended to that part of the electric power business ‘which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce.’ Reserved to the states was the power not only to control intrastate sales, but also to regulate those interstate aspects of the

power industry which did not require uniform national regulation . . .”

Electric Power and Government Policy, The Twentieth Century Fund, 1948, pp. 82-83.

Thus, where the original sale of electric energy for interstate transmission was under federal control, and no other state was affected in any way by regulation of the subsequent transaction, the California Public Utilities Commission could regulate such subsequent transaction and the Federal Power Commission had no authority to do so.

Southern California Edison Co. v. Federal Power Commission (CA 9, 1962), 310 Fed. 2d 784, c. den. 372 U.S. 958, 10 L. Ed. 2d 11, 83 S. Ct. 1014.

Thus, by 1954, a clear pattern of supplemental federal, state and local regulatory jurisdiction had been established, subject to continuing definition by the courts in areas of overlap.

- B.** In 1954, in the course of an extensive amendment of the Atomic Energy Act of 1946, Congress found occasion to reaffirm its electric power policy.

It did so by inserting the following provision:

“Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale or transmission of electric power.” (42 USCA, Sec. 2018.)

It is to be noted that this provision was placed in a portion of the amendatory act entitled “*Agency Jurisdiction.*”

Section 2018 of Title 42 was not contained in the original bill to amend the AEC Act of 1946, either in the House, H.R. 8862, introduced on April 15, 1954, or the Senate, S. 3323, introduced on April 19, 1954.

It first appeared in a Committee Print on May 21, 1954, entitled "Draft in Bill Form Incorporating Changes Proposed to be Made in H.R. 8862 and Companion Bill S. 3323." The language was exactly the same as was finally enacted as Section 271, but it was there identified as Section 5.

The Joint Committee on Atomic Energy submitted its Report on the bill to the Senate on June 30, 1954. At page 779 of Vol. 1, the Report states:

"Section 271 preserves the regulatory power of any appropriate agency with respect to the generation, sale, or transmission of electric power."

See

(House Report No. 2181, Senate Report No. 1699, 83rd Congress, 2nd Session, see page 3487, 2 US Code Congressional and Administrative News.)

The following remarks are taken from *Legislative History of the Atomic Energy Act of 1954*, Volume III, 1955, commencing at page 3834:

"Mr. Hickenlooper. What section 271 does is to make clear that this act does not interfere in any way with the jurisdiction of the Federal Power Commission over such activities or with State agencies where they have jurisdiction, or with local agencies where they have jurisdiction.

“It is not an authority given in a negative way. *It is a positive negation of any intent by this statute to interfere with the existing laws and the existing authorities, State and Federal, that have to do with electricity.* (Emphasis added.)

...

“We do not back into it. We are very careful in this bill not to attempt to write into it affirmative law which may have to be interpreted by the courts, but merely to say that the present existing authority shall not in any way be interfered with in the regulation of interstate transmission of electric energy, in that general field. We make it very clear that we do not disturb existing law.

“If the Senator will indulge me for a moment, I will say this: There is a reason for saying it this way, as we have said it in the bill. Every time a State legislature or the United States Congress passed (sic) a bill on a subject, giving affirmative relief or containing affirmative provisions, that new legislation is bound to be subject at some time or other to interpretation as to what it means. Does it mean to change? Does it mean to alter? Does it create any new situations?

“We have attempted in this bill to eliminate such questions as that by merely saying the existing authority for the regulation of the flow of interstate power—whatever those regulations may be or whatever the authority which now exists in the Federal Power Commission is—remains the same.

...

“... The Federal Power Act refers to the wholesale distribution under the Federal Power Com-

mission; and the local distribution, so far as I know, is under the jurisdiction of the local regulatory body, either the State or municipal or other regulatory body.

...

"... We say that nothing in this act shall interfere with or affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale or transmission of electric power. We say that this act does not interfere with the rights and the power and the authority of any Federal, State or local regulatory body whatever; and the power and the authority which may be there now for the transmission of electricity or the generation of electricity or whatever the authority may be is not changed.

...

"There was a move on the part of the committee to put this section 271 in the bill as a safeguard and as an assurance that the existing authority of the Federal Power Commission or the Federal law or agency and the existing authority of local agencies, and the existing authority of the State agencies, whatever they may be in connection with the transmission of electric energy, would not be disturbed or interfered with in any way."

While the particular threat of dislocation of the pattern of existing authority arose out of permission given by the same act to AEC to generate and distribute electric power produced by the use of atomic means, it is clear that Congress was satisfied with, and intended to continue, undisturbed, existing state and local authority over all electricity, including that produced by atomic means.

It is clear that regulation of the transmission of electricity involves the power to determine the location and character of transmission lines. It is equally clear that no ordinary customer for electricity would be permitted to build a transmission line in defiance of such regulations.

C. In context AEC's position is that of a mere customer for electricity who must pay such a price for the desired commodity or service as is charged to other consumers of comparable size determined by relevant factors of cost and profit, including, where applicable, local regulation.

In determining the price to be charged any customer of electricity, the capital investment for transmission facilities is a necessary consideration. Before calculating a profit in terms of "fair return" upon investment, the size of the investment would be determined by questions of operational safety¹² and right-of-way location.¹³ A California public utility must

¹²The California Supreme Court has recognized the hazards of an overhead 220,000 volt line such as the AEC plans to build. In *P. G. & E. v. Hunt Estate Co.*, 49 Cal. 2d 565, at p. 572, the Court said:

"A reasonably foreseeable hazard to be created in stringing a 220,000 volt power line for more than 3 miles across one's land is manifestly a proper item to be considered in determining the damage to the property, not only to the land underlying the easement, but also to all the land which conceivably might be affected by the hazard . . ."

¹³In *Report to the Joint Committee on Atomic Energy*, "Background Information on the High Energy Physics Program and the Proposed Stanford Linear Accelerator Project" (1961), the following item appears at page 333:

"Item C3, *Utilities*, shows an increase, attributable to both escalation and design changes. Item (a), Pacific Gas and Electric Company powerline, has almost doubled in cost due to rapidly-increasing right-of-way costs . . ."

locate its transmission lines in a manner compatible with the greatest public good and least private injury.¹⁴

That the denial of an overhead 220 KV line is reasonable, as well as consistent with the pattern of development in the State of California as a whole, is evidenced by the following excerpt from a recent decision of the California Public Utilities Commission:

“It is clear, particularly in a State such as California where unplanned suburban expansion, coupled with our population explosion, may quickly result in a depletion of all scenic attractions, the citizenry must become more and more vocal in their desire to maintain their native landscape . . . The ever-growing and oft-expressed desire of more and more Californians for green space conservation should be acknowledged by California public utilities in their planning.”

Ligda et al. v. P. G. & E., Case No. 7587, May 7, 1963.

The developing trend of local underground utility ordinances is evidenced by comparing the findings of fact and decision in *City of Los Angeles v. City of Huntington Park*, 32 CA 2d 257 (1939) with the recent decisions of *Long Island Lighting Company v. Shields*, 190 Misc. 797, aff'd 274 App. Div. 803, aff'd 299 N.Y. 562 and *Town of Hamilton v. Department of Public Utilities*, 190 N.E. 2d 545.

In the 1939 California case, the court found, with respect to proposed underground construction of 275,000 volt lines,

¹⁴*California Code of Civil Procedure*, Section 1241 (2).

“... that underground construction of said lines would be impracticable . . . for the reason that the use of underground cables for high voltage transmission lines has not yet developed to a sufficient extent that they may be said to be beyond the experimental stage.”

By 1962, underground high voltage transmission lines were commonplace in urban areas, and in *Town of Hamilton v. Department of Public Utilities, supra*, at p. 553, it was said:

“It is appropriate for municipalities, even in the absence of guiding or controlling legislation, to plan to improve and beautify their central areas and public ways and to maintain the natural beauties of villages and rural areas. That overhead wires have been tolerated in many of the towns, cities, and countrysides of the United States (as they are not in all parts of the world) does not mean that the increased costs of accommodating a line to such may not be justified.”

Mr. Justice Douglas of the United States Supreme Court, in commenting recently on the very overhead line from which the AEC proposes to take its power, said:

“On a recent visit to California I was shocked to see the green rolling hills that make up the Coast Range being marred by huge towers carrying power lines. Why should not the power be transmitted by buried cables? It would cost more to do it that way. But what about the aesthetic values? Are they not worth enough to be preserved at almost any cost? Ugliness is not an inevitable cost of modernity.”

Ladies Home Journal, July, 1964, page 40.

At all stages of the planning and construction of the Linear Accelerator project, prior to the filing of these actions, AEC had conceded that it was “merely a customer for electrical energy.” (Statement of the Case, *supra*, pp. 3, footnote 4.)

The AEC’s position in this case is nearly identical to the government’s position in *U.S. v. Oklahoma Gas and Electric Co.*, 297 Fed. 575, where the federal government had contracted with a public utility for electric power at rates below those later required by the Oklahoma state regulatory agency. The Circuit Court of Appeals upheld the state’s right to require the higher rate stating, at page 579:

“The government was contracting with one of its citizens to do a very common and ordinary thing not in any way relating to or involving its existence, viz, furnish electricity for lighting and motor power at Ft. Reno Remount Depot. We see no reason why as to a contract of this nature the government should occupy any different position than if the same had been made between two of its citizens.”

D. Congressional intent determines whether or not an Executive agency is to bear the burden of locally-determined prices.

It is true that the United States Supreme Court has sometimes upheld the right of a federal agency to disregard minimum prices fixed by local regulation.

The most recent decision of the United States Supreme Court on this subject is *Paul v. United States*, 371 US 245, 9 L. Ed. 2d 292, 83 S. Ct. 426.

This case involved a conflict between the policy of the United States demanding competition in sales of

commodities to the Armed Forces and the policy of the State eliminating competition in the sale of milk below its prescribed minimum prices.

Even so, the Court carefully examined the statutory exceptions to the policy of competition, and the regulations under the statute, and concluded that the exceptions did not apply. (9 L. Ed. 2d 292, 297-303.) The plain implication of this procedure is, that had the Court found the exceptions applicable, it would have determined the Congressional policy to be that even though the state regulation was a burden, it was to be borne by the government.

Such a determination and such a Congressional policy explained, the Court said, the seemingly opposite opinion of the Court in *Penn Dairies Inc. v. Milk Control Com.*, 318 US 261, 87 L. Ed. 748, 63 S. Ct. 617, dealing with an earlier procurement regulation which “. . . manifested a federal ‘hands off’ policy respecting minimum price laws of the States . . .” (9 L. Ed. 2d 292, 299, col. 2.)

In other cases, however, the Court has expressly ruled that the burden of additional cost to the government by reason of local regulations would not cause such regulations to be inapplicable. In *James Stewart and Co. v. Sadrakula*, 309 US 94, 84 L. Ed. 596, at 599, the Court required a government contractor to comply with a local safety statute, stating:

“It is true that it is possible that the safety requirement of boarding over the steel tiers may slightly increase the cost of construction to the government, but such an increase is not significant in the determination of the applicability of

the New York statute. In answer to the argument that a similar increased cost from taxation would 'make it difficult or impossible for the government to obtain the service it needs,' we said in *James v. Dravo Contracting Co.* (302 US 134, 160; 82 L. Ed. 155, 172) that such a contention 'ignores the power of Congress to protect the performance of the functions of the National Government and to prevent interference therewith through any attempted state action.' "

In *Public Housing Administration v. Bristol Township*, 146 F. Supp. 859 (D.C. E.D. Penn. 1956) a federal agency sued to enjoin enforcement of a city's stop work order against an electrical contractor working on a public housing project. The Court upheld the city ordinance, stating, at page 863:

"In applying the supremacy clause of the United States Constitution, Article VI, Clause 2, the task of a court is to determine whether the state or local police power regulation . . . is compatible with the policy expressed in the federal statutes and in the Federal Constitution. An examination of the Lanham Act, as amended, 42 U.S.C.A., Sections 1521-1590, indicates . . . that Congress expressed its intent that projects constructed under this Act 'shall, so far as may be practicable, conform in location and design to local planning and tradition, 42 U.S.C.A. §1545, and that government ownership of the project shall not deprive any state or political subdivision thereof of the civil and criminal jurisdiction . . . ' "

"The United States Supreme Court has consistently held that Congress, in enacting legislation within its constitutional authority, will not be

deemed to have intended to invalidate state or local rules for protection of the public safety unless its purpose to do so is clearly stated . . .”

“The United States Supreme Court has construed the language of Article IV, Section 3 of the Constitution [Congress shall have power to make rules re U. S. property] as requiring that the method of disposing of government property ‘must be consistent with the foundation principles of our dual system of government and must not be construed to govern the concerns reserved to the states.’ *Ashwander v. TVA*, 297 U.S. 288, 338, 565, Ct. 466, 80 L. Ed. 688 . . .”

“The United States Supreme Court has repeatedly stated that the extension of federal control into traditional local fields is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions (citing cases) . . . *the hearing judge believes that Congress did not intend, either by its specific enactments or by its silence, to interfere with the attempts of Bristol Township to require Mr. Branson to secure building permits in this situation so as to safeguard the safety of its citizens from possibly hazardous electric repair work.*” (Emphasis added.)

E. Other portions of the Atomic Energy Act display a Congressional intent to limit closely the powers of the Atomic Energy Commission.

(1) There is statutory limitation of AEC's powers in certain fields traditionally of local interest.

Section 2018 of Title 42 is not the only section of the Atomic Energy Act of 1954, as amended, which

restricts AEC powers. Congressional desire specifically to preserve state and local regulatory powers was reiterated in the 1959 amendments relating to radiation hazards. (Section 2021 et seq.) After a preamble reciting a desire "to promote an orderly regulatory pattern between the Commission and state governments" with respect to nuclear development (Section 2021(a)(3)), Section 2021(k) was inserted:

"Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes *other than protection against radiation hazards.*" (Emphasis added.)

Congress thus pre-empted the field of protection against radiation hazards, but again indicated the intent to preserve state and local power in other fields related to AEC activities.

The California Supreme Court recognized this in the recent case of *Bodega Head & Harbor, Inc. v. Public Utilities Commission*, 61 A.C. 107, at page 114:

"... it is clear that the federal government has not pre-empted the field, at least with respect to the phase of protecting the public from hazards other than radiation hazards, and that the states' powers in determining the *location* of atomic reactors are not *limited* to matters of zoning or similar local interests other than safety." (Emphasis added.)

That the AEC recognized the limitation inherent in the language of Section 2021(k) is shown by the comment of one of its attorneys, Robert Lowenstein, in discussing the proposed amendment as early as 1957:

“Thus the bill is not intended to restrict the states in the exercise of their responsibilities for *zoning . . .*” (Emphasis added.)

Symposium, Atomic Energy and the Law,
Berkeley, California, November 14-16, 1957,
page 102.

(2) With respect to the authorization for the Linear Accelerator Center, there is evidence in the statutory history that Congressional approval was predicated on the ability to build the center *without* condemnation.

For example, from *Hearings Before the Sub-Committee on Research and Development and the Sub-Committee on Legislation, Joint Committee on Atomic Energy*, 86th Congress, First Session, July 14, 15, 1959, at page 470:

“Stanford University proposes to construct a two-mile linear electron accelerator at a site adjacent to the University Campus on Stanford-owned land. The Stanford proposal is contained in a report prepared by the University staff titled ‘Proposal for a Two Mile Linear Electron Accelerator’, dated April, 1957.”

At page 58:

“Dr. Williams: If I may then proceed, the availability of a site at no cost, located only a few minutes away from the Stanford campus, is particularly fortunate.”

F. In addition to its electric power policy, other policies of Congress are implemented by the local determination against overhead power lines.

In addition to the specific language of Sections 2018 and 2021(k), taken with the cooperative regulation contemplated in the field of electric power, Congress has likewise enacted positive legislation supporting the purposes of local legislation preserving open spaces and scenic beauty. The underground ordinance of Woodside and other California cities is manifestly founded in part on the principle enunciated by the Supreme Court in *Berman v. Parker*, 348 US 26, 99 L. Ed. 27 at page 38:

“The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully-patrolled.”

The intention of the Woodside ordinance is to preserve and protect a scenic mountainside area, characterized by steep gradients, a thin crust of soil, heavy rainfall, acute erosion problems, fire hazard and stands of redwood trees in excess of 100 years old. See Supporting Affidavit of Janet K. Adams (R., pages 63-65).

Congress has specifically enunciated a federal policy in support of the same goals as the Town of Woodside's underground ordinance in at least two relatively-recent enactments.

Title VII of the Federal Housing Act of 1961 contains sections which are now found in Title 42, Section 1500 et seq., U. S. Code. From Section 1500(b) :

“It is the purpose of this chapter . . . to help provide necessary recreational, conservation, and scenic areas by assisting State and local governments in taking prompt action to preserve open-space land which is essential to the proper long-range development and welfare of the nation’s urban areas in accordance with plans for the allocation of such land for open-spaces.” (Public Law 87-70.)

With respect to highways, and the recently approved Interstate Defense System (Title 23, U. S. Code, Section 131 et seq.) Congress provided not only for the safety and convenience of public travel, but for its *enjoyment*, declaring:

“It is declared to be in the public interest to encourage and assist the States to control the use of and to improve areas adjacent to the interstate system . . . it is declared to be a national policy that the erection and maintenance of outdoor advertising signs . . . should be regulated . . .

“The Secretary of Commerce is authorized to enter into agreements with State highway departments . . . any such agreement . . . may include, among other things, provision for preservation of natural beauty, prevention of erosion, landscaping, re-forestation, development of view points for scenic attractions that are accessible to the public without charge . . .” (Section 131.)

“Such contract likewise may include the purchase of such adjacent strips of land of limited width and primary importance for the preservation of

the natural beauty through which highways are constructed not to exceed 3% of such sums apportioned to a State in any fiscal year in accordance with section 104 of this title may be used for the purchase of such adjacent strips of land without being matched by such State.” (Section 319.)

Congress has thus indicated its general approval of the purposes reflected by the Woodside ordinance. Where such general approval exists, the Supreme Court has on at least one occasion upheld a local ordinance which was argued to be in direct conflict with a federal law.

In *Huron Cement Co. v. Detroit*, 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1959) the court upheld a Detroit city smog abatement ordinance which required structural alteration of vessels licensed for interstate commerce. The ordinance was upheld against the usually-accepted contention that the United States had pre-empted the field by its own federal licensing requirements relating to the vessels.

As to the argument that the local ordinance burdened interstate commerce, the court said (4 L. Ed. 2d 852, at p. 857):

“... the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community. Congress recently recognized the importance of legitimacy of such a purpose when in 1955 it provided:

‘... it is hereby declared to be the policy of Congress to preserve and protect the primary

responsibilities and rights of the states and local governments in controlling air pollution.' ”

In the case of the Woodside ordinance, the town seeks to protect itself against the hazards and ugliness of overhead power lines. Congress has strongly supported such purposes by affirmative legislation.

Congress intended local agencies to regulate the transmission of electricity and forbade AEC to exercise such power. The exercise of such authority involved power to determine the character and location of transmission lines, and, indirectly, the price of electricity resulting from the exercise of such authority. Congress, by its policy, has consented that AEC, as a customer of electricity, should pay the price so determined.

IV

THE AEC'S LACK OF POWER TO DETERMINE THE CHARACTER AND LOCATION OF AN ELECTRIC TRANSMISSION LINE USED IN LOCAL DISTRIBUTION OR FOR THE TRANSMISSION OF ELECTRICITY IN INTRASTATE COMMERCE PREVENTS THE UNITED STATES FROM CONDEMNING PROPERTY FOR SUCH USE AT THE COMMISSION'S REQUEST.

The power to determine public uses and to authorize a taking is a legislative, not an executive, power. (*Nichols, Eminent Domain*, Sec. 3.15.) The general statute providing for condemnation (40 USCA, Sec. 257) is procedural in nature, and authority to condemn must be found elsewhere (*U.S. v. Kennedy*, CA 9, 278 Fed. 2d 121).

A. Authority to condemn may be limited by statute.

The legislature may, of course, limit the power, either in the authorizing statute, (*Puerto Rico Ry. L. & P. Co. v. U.S.*, CA 1, 131 Fed. 2d 491) by requiring approval of some body other than that which seeks to condemn, (*Virgin Islands H & R Authority v. [Certain land]* 161 F.S. 475) or in a separate statute (*Maiatico v. U.S.*, C.A.D.C., 302 Fed. 2d 880).

In *Maiatico v. United States*, 302 F. 2d 880 (1962) the General Services Administration sought to condemn a building in the District of Columbia. The defendant argued that the building was not within the "taking area" authorized by Congress, and that the approval of a Congressional Committee had not been obtained, as required by statute. The government relied on a Supplemental Appropriations Act which provided:

"Appropriations under the heading 'Construction, Public Building Projects' shall be available for (1) acquisition of buildings and sites thereof by purchase, condemnation or otherwise . . ."

The district court denied defendants' motion to dismiss, but the circuit court reversed, stating, (at page 885):

"The government would have to say that the general provision of the Second Supplemental Appropriation Act supplants the limitations of the Public Buildings Act of 1959 and the Appropriations Act which had so carefully been linked to the former. Carried to its logical conclusion, the Governments' construction would sweep away all pre-existing requirements. Any such inversion of

the purpose of Congress would be in direct conflict with the governing principle to be applied here. 'However inconclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208; 52 S. Ct. 322; 76 L. Ed. 704. The general provision, at least as applicable to the acquisition of property in the District of Columbia, can not be seen to repeal the special legislation which Congress with great care had specified as governing here."

In the case at bar, pre-existing provisions of the Federal Power Act, re-affirmed in the Atomic Energy Act itself (42 USCA, Sec. 2018) necessitating the approval of the character of power lines by state regulatory agencies, control any general authorization to A.E.C. apparently permitting it to exercise the right of eminent domain.

B. Authority to condemn may be limited by constitutional provisions.

The right to own and hold property, even against the government, is constitutionally protected by the prohibition against its taking except for a public use.

U. S. Constitution, Amendment V.

Involved in the regulation of electric power is authority to determine the character and location of transmission lines. Approval of a proposed line is a determination that a line, so located, is a public use.

Disapproval of the location of a proposed line of a proposed character is a determination that such a line, so located, is not a public use.

By its overall restraint in the field of electric power, as to generation and distribution as well as transmission, Congress has left the questions of public use in these fields to state and local determination. The Town and County legislative bodies have determined that a power line in the area condemned would *not* be a public use. How, then, can the AEC, restricted in its jurisdiction by 42 *USCA*, Section 2018, from affecting local regulations, declare that a power line in the same area *is* a public use?

The court has the power to determine whether the use for which private property is authorized to be taken by the governmental agency is, in fact, a public use.

Shoemaker v. United States, 147 U.S. 282, 298.

In the case at bar, this fact is to be determined by finding whether or not the proposed line has been approved as to location and character by the local bodies engaged in the regulation of the transmission of electricity.

V

CONCLUSION

AEC's lack of authority to determine the character and location of an electric power transmission line has been demonstrated in point III, *supra* (p. 5 et seq.).

Such authority as AEC has to take property by eminent domain has, in the case at bar, (1) been limited by the statutes expressing Congressional policy with respect to power regulations, preservation of natural resources, and regulation by local agencies of activities for purposes other than protection against radiation hazards, or (2) by the Constitution of the United States, Amendment V, following a determination by local agencies, pursuant to Congressional policy, that AEC's proposed power line is not a public use.

If these defenses appeared as a matter of law, from the allegations of the complaints, appellants' motions to dismiss should have been granted. If they appeared from the materials in support of the motions for summary judgment, those motions should have been granted. In any event, appellants' motions and pleaded defenses, involving these matters, should not have been stricken.

The orders of the District Court appealed from should be reversed with directions to render judgment for appellants.

Respectfully submitted,

AUSTIN CLAPP,

Of Counsel for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Nos. 19,373 and 19,374
United States Court of Appeals
For the Ninth Circuit

JOSEPH A. MAUN, as trustee, 1962 trust
for Alys Wunderlich Bachler, Town
of Woodside, et al., *Appellants.*

VS.

UNITED STATES OF AMERICA, *Appellee.*

No. 19,373

WILLIAM J. ADAMS and JANET K. ADAMS,
et al., *Appellants,*

VS.

UNITED STATES OF AMERICA, *Appellee.*

No. 19,374

**Appeal from the United States District Court for the
Northern District of California,
Southern Division**

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United States v. Oklahoma Gas & Electric Co., 297 F. 575 (C.A. 8, 1924)	35
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Federal Power Act of 1935, 16 U.S.C. Section 824(b)	33
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Nos. 19,373 and 19,374

**United States Court of Appeals
For the Ninth Circuit**

JOSEPH A. MAUN, as trustee, 1962 trust
for Alys Wunderlich Bachler, Town
OF WOODSIDE, et al., *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

No. 19,373

WILLIAM J. ADAMS and JANET K. ADAMS,
et al., *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

No. 19,374

**Appeal from the United States District Court for the
Northern District of California,
Southern Division**

APPELLEE'S BRIEF

INTRODUCTION

For some unknown reason counsel for appellants have persisted in an attempt to cast an aura of confusion around the basic issue determined below and, a fortiori, involved in this appeal. It will be recalled that appellants' Petition for Permission to Appeal (filed in this Court on June 29, 1964) stated that the

controlling question of law involved in the Order of the District Court below was:

Whether or not a proposed taking in the two pending actions would violate the provisions of the Fifth Amendment to the Constitution of the United States because the proposed taking is not for public use?

Appellants' Petition also contained several pages devoted to a discussion of "procedural contentions" wherein appellants urged as error that portion of the District Court's Order which struck their Motions for Summary Judgment and Dismissal (Pet. 9-11). Appellee filed an Answer to appellants' Petition (Filed in this Court on July 10, 1964) wherein counsel for appellee was compelled to state that appellants' Petition presented a "wholly inaccurate and misleading picture of the case below" (Answer 3). Appellee's Answer then proceeded to present what is believed to be an accurate statement of the case below and of the issue and controlling question involved in the District Court's Order (Id. at 11-12). The Answer also discussed appellants' contentions concerning "procedural" errors and it was demonstrated therein that said contentions were not supported either by the record or the authorities to which appellants referred (Id. at 14-16).

Appellants have now filed their opening brief and counsel for appellee were hopeful that the prior confusion concerning the issue involved below and that which is to be determined in this appeal would be clarified. Much to our surprise, however, we find

that appellants' brief, rather than clarifying the matter, actually compounds the confusion! First of all, contrary to counsel for appellants' Certification of Compliance (Br. 30), there has been no compliance with Section (d) of this Court's Rule 18 in that nowhere in appellants' brief is there set forth a list of what appellants *currently* allege to be specifications of error. It is also surprising to find that appellants' brief states that the controlling questions of law are *now* alleged to be (Br. 2):

Does the AEC have power to determine the character and location of an electric power line used in local distribution or for the transmission of electricity in intrastate commerce?

Does the AEC's lack of power to determine the character and location of an electric transmission line used in local distribution or for the transmission of electricity in intrastate commerce prevent the United States from condemning property for such use at the Commission's request?

Although appellants' brief contains no arguments or authorities concerning their so-called "procedural contentions," we find allegations in their Statement of the Case (Br. 3) and in their Conclusion (Br. 29) wherein it appears that they continue to urge them as part of this appeal. This aura of confusion is further expanded by appellants in that we also find other "issues" sprinkled liberally throughout their brief. For example, their brief contains: (a) a discussion of the alleged desirability and practicality of constructing the transmission line in question underground rather than overhead (Br. 13-16; 22-25) and,

(b) a few vague remarks and conclusions concerning the authority of the Court to determine whether the proposed use of the easement condemned is, in fact, a "public use" (Br. 27-28).

This is an extraordinary appeal under 28 U.S.C. 1292 (b), the interlocutory appeal statute, and as such it would seem clear that the only issue or question before this Court is that which was certified by the District Court. Counsel for appellee are of the firm belief that the District Court's Order and the record in this matter, as supplemented by the discussion and authorities in our Answer to appellants' Petition for Permission to Appeal, unequivocally establishes that the sole issue and question of law to be determined in this Section 1292(b) appeal is: "Whether or not the provisions of 42 U.S.C. Section 2018 limits the authority of the Atomic Energy Commission to condemn the easement here in question and to construct thereon an electrical transmission line contrary to local ordinances." In this belief then, counsel for appellee have devoted this brief to a consideration and discussion of this sole issue.

JURISDICTION

This consolidated appeal consists of two eminent domain proceedings instituted in the District Court below by the United States at the request of the Atomic Energy Commission (hereinafter referred to as AEC), pursuant to 28 U.S.C. Section 1358. On

June 12, 1964, the District Court granted appellee's motion to strike: (1) all defenses and objections raised in appellants' Answers, and (2) their Motions for Summary Judgment and for Dismissal (R. Vol. 1a 84; Vol. 1b 33).¹ This Order was amended on June 17, 1964 to include a recitation which would permit a petition to this Court under the provisions of 28 U.S.C. Section 1292(b) (R. Vol. 1a 86; Vol. 1b 35). Subsequently, on July 23, 1964, this Court granted appellants' Petition for interlocutory appeal, pursuant to the aforesaid 28 U.S.C. Section 1292(b) (R. Vol. 1a 90; Vol. 1b 42).

QUESTION PRESENTED

Contrary to the position taken by appellants, appellee, as hereinabove noted, contends that the sole issue and question presented in this appeal is:

Whether or not the provisions of 42 U.S.C. Section 2018 limits the authority of the Atomic Energy Commission to condemn the easement here in question and to construct thereon an electrical transmission line contrary to local ordinances (R. Vol. 1a 84-85; Vol. 1b 33-34).

¹There are physically three volumes of transcript of record for the cases involved in this appeal. Unfortunately, however, two volumes are designated "Volume One," one each for proceeding Numbers 19,373 and 19,374. Volume Two is the reporter's transcript of certain consolidated hearings before the Court below. Wherefore, in order to avoid confusion herein, Volume One of Number 19,373 shall be referred to as Volume 1a, and Volume One of Number 19,374 shall be referred to as Volume 1b.

STATEMENT OF THE CASE

Although appellants' present Statement of the Case is quite different from that which was set forth in their Petition for Permission to Appeal (Pet. 1-5), it is submitted that appellants still have not presented an accurate and complete statement of the facts of this case. Counsel for appellee, therefore, finds that we cannot subscribe to the current Statement of the Case set forth in appellants' brief and must once again² set forth what we believe to be a more factual and accurate statement of the case below.

On May 13, 1960 (74 Stat. 120), Congress authorized an AEC research project known as the Stanford Linear Accelerator Center (hereinafter referred to as SLAC), and the sum of \$114 million dollars was subsequently authorized for the construction thereof; and it is currently nearing completion on the campus of Stanford University (Act of Sept. 26, 1961, 75 Stat. 676). Since this AEC project is intended and designed for basic *research* in high energy physics and not as a plant for the production of electrical energy by nuclear means, one of the essential requisites is the availability of a sufficient quantity of conventionally generated electricity to operate the complex equipment to be installed in this project. Consequently, on January 10, 1963, AEC entered into a contract with the Pacific Gas and Electric Company (hereinafter referred to as PG&E), the local utility com-

²As we were forced to do in our Answer to appellants' Petition.

pany.³ Pursuant to the terms of this contract, PG&E was to furnish the necessary power to SLAC and, incident thereto, undertook to construct, operate and maintain certain overhead transmission lines from its closest feeder line to SLAC (Ibid.). PG&E then proceeded to apply for the appropriate construction "use permits" from the County of San Mateo and the Town of Woodside.⁴

At this time neither the County of San Mateo nor the Town of Woodside had an ordinance which required such transmission lines to be placed underground; nevertheless, PG&E was met with demands that the line be placed underground as a condition to the issuance of the necessary use permits (Ibid.). It was soon apparent that such an underground transmission line would not be as serviceable or desirable to either PG&E or AEC from a service point of view and that it would also entail an additional cost of several millions of dollars over and above the estimated cost of an overhead line (Id. at 33). The continuing demand that the line be placed underground led to many conferences between the interested parties, with several plans and suggestions being exchanged, all without benefit of mutual agreement. The controversy reached such proportions that on January 29, 1964, the Joint Committee on Atomic Energy of the United States Congress conducted a full and complete

³See Letter of March 7, 1964 from the Chairman of AEC to the Mayor of the Town of Woodside (R. Vol. 1a 32).

⁴Contrary to the allegation of appellants at page 6 of their Brief, PG&E was at no time acting as agent for AEC but was acting solely in its capacity as a local utility company (Ibid.).

hearing concerning this problem (Hearing before the Joint Committee on Atomic Energy on Stanford Accelerator Power Supply, 88th Cong., 2nd Sess., Jan. 29, 1964).

By letter of March 7, 1964 the Chairman of AEC notified the County of San Mateo and the Town of Woodside that, although AEC was willing to attempt to find a mutually agreeable solution to this problem, time was of the essence since SLAC was nearing completion (*Ibid.*). The Chairman went on to say that if PG&E was unable to obtain the necessary use permits to enable it to perform its contractual obligation and construct the transmission line, AEC would be forced, in the national interest, to intervene directly by instituting eminent domain proceedings and to construct their own line (*Id.* at 37-38). In spite of the foregoing, PG&E was subsequently denied use permits by the Town of Woodside and the County of San Mateo.⁵ On March 9, 1964, the Town of Woodside passed a "Temporary Interim Zoning Ordinance" prohibiting the construction within the town boundaries of overhead transmission lines in excess of 50,000 volts (*R. Vol. 1a 14*). On March 24, 1964, at the request of AEC, a Complaint in Condemnation was filed in the Court below condemning, in essence, a 100 foot wide easement over approximately 4.92 acres of land located within the boundaries

⁵It is to be noted that the County of San Mateo Planning Commission had previously granted PG&E a conditional use permit that was subsequently revoked by the Town of San Mateo Board of Supervisors (*R. Vol. 1a, Minutes, Board of Supervisors of San Mateo County, April 21, 1964, marked "Exhibit F" following page 74 of Record*).

of the Town of Woodside (R. Vol. 1a 1). This Complaint was followed by a Declaration of Taking on April 30, 1964 (R. Vol. 1a 47). Also on April 30, 1964, a second condemnation action was instituted and a Complaint and Declaration of Taking were filed condemning the remainder of the easement consisting of approximately 24.57 acres located within the County of San Mateo but outside the boundaries of the Town of Woodside (R. Vol. 1b 1 and 10).

In the light of prior events, counsel for the Government were aware that certain objections would undoubtedly be interposed to these condemnation proceedings. Wherefore, concurrently with the filing of the Declarations of Taking aforesaid, Government counsel appeared before the Honorable Lloyd H. Burke, District Judge, and requested that the Government be granted modified Orders of Possession limited to permission for AEC and/or its agents to conduct field surveys and design inspections; which Judge Burke granted (R. Vol. 1a 57; Vol. 1b 22). Government counsel also suggested, for the purpose of eliminating unnecessary repetition, that time should be allowed for service upon all the named defendants and for an opportunity for those who desired to file whatever objections to the taking they thought necessary and proper; and, that thereafter all objections and motions filed in both cases be consolidated and heard at one time. The Court and counsel for appellants, who were present during this hearing, agreed to the suggestion and a hearing^{*} was set for June 4, 1964.

As anticipated, a number of landowners did raise objections to the taking and the following documents and motions were filed in the Court below prior to June 4, 1964, by the defendants specified.⁶

In Civil 42214 (This Court's Number 19,373):

(1) Answers and Motions to Dismiss, by Defendants:

(a) Howell C. and Edith M. Jones, filed April 14, 1964, as to Tract 109E (R. Vol. 1a 19).

(b) Town of Woodside, filed April 14, as to all property described in this proceeding by reason of taxes and assessment liens on said properties (R. Vol. 1a 8).

(c) Jane F. Carrigan, filed May 7, 1964, as to Tracts 108E-2 and E-3 (R. Vol. 1a 58).

(d) Joseph A. Maun, trustee, filed May 21, 1964, as to Tract 105E-2 (not in transcript of record).

(e) Charles Savage and Ethel M. Savage, filed April 14, 1964, as to Tract 110E (R. Vol. 1a 23).

(2) Notice of Motion to Dismiss and Memorandum in Support Thereof, filed April 14, on behalf of the above named defendants (R. Vol. 1a 27).

(3) Notice of Motion for Summary Judgment and Memorandum of Points and Authorities in

⁶It should be noted that not all of the landowners involved in these proceedings have objected to the taking; and there are, therefore, several landowners who are ready to proceed with a determination of just compensation.

Support Thereof, on behalf of the above named defendants, filed May 25, 1964 (R. Vol. 1a 62).

In Civil 42323 (This Court's Number 19,374):

Answers and Motions to Dismiss, filed by defendants:

(a) William J. and Janet K. Adams, and Donald H. and Lois N. Scofield, filed on May 20, 1964, as to Tract 104E (R. Vol. 1b 23).

(b) Joseph A. Maun, trustee, filed on May 21, 1964, as to Tract 105E-1 (R. Vol. 1b 28).

Since the objecting defendants were essentially represented by the same counsel, it was not surprising to find that the objections and alleged defenses raised were substantially identical and may be summarized as follows:

(1) AEC is not authorized to condemn for the purposes stated in the Complaint.

(2) AEC is attempting to violate certain local ordinances pertaining to electrical transmission lines, and they are precluded from doing so by 42 U.S.C. Section 2018.⁷

(3) AEC has not conformed to the requisites of aforesaid ordinances and are not, therefore, entitled to use the easements for the purposes stated.

⁷In appellants' Statement of the Case, it is alleged that their defenses below were predicated upon Section 2018 *and* upon the Federal Power Act of 1935 (Br. 4). The Record does not support this allegation.

(4) AEC's proposed use of the easement condemned is unlawful in that it violates the aforesaid ordinances and is, therefore, a non-public use.

(5) AEC has not been appropriated funds for the purpose of this condemnation and/or the construction or the facilities to be constructed upon the easement taken.

(6) AEC has not been authorized to engage in the transmission of electrical power in these circumstances.

On June 3, 1964, appellee filed a Motion to Strike: (1) defendants' Motion to Dismiss and for Summary Judgment, and (2) all alleged defenses or objections to the taking raised in defendants' Answers (R. Vol. 1a 81). Attached to said Motion was a comprehensive Memorandum of Points and Authorities in support thereof.

At the request of the Court, there was a one-day continuance for the hearing, and on June 5th, oral argument was presented before the Honorable Albert C. Wollenberg, District Judge. During the hearing, Judge Wollenberg attempted to simplify the issues to be decided and, in so doing, he stated initially that he was convinced by the authorities cited in the Government's memorandum that Rule 71A(e) F.R.Civ.P. clearly precluded any pleading or motion by defendants other than an answer. He, therefore, granted the Government's Motion to Strike the Defendants' Motions to Dismiss and for Summary Judgment (R. Vol. 1a 84; Vol. 1b 33; Vol. 2, 12). In doing so,

however, he noted that defendants were not prejudiced in that the objections raised in defendants' Motions to Dismiss and for Summary Judgment were merely repetitious of those raised in their Answers, and that these issues were now before the Court on the Government's Motion to Strike (R. Vol. 2, 10 through 13). Having resolved this rather incidental procedural matter, Judge Wollenberg then directed his attention to ascertaining the basic issues sought to be raised by the objecting defendants.

After discussion between counsel and the Court, it was agreed that there was really no contention by defendants that AEC did not have the general authority and appropriations to condemn, nor that the use of the facility in question was not a public one; it was also agreed that the really basic issue was whether AEC was precluded by 42 U.S.C. 2018 from condemning the easements in question and constructing an electrical transmission line thereon, contrary to local ordinances (R. Vol. 2, pp. 14, 15, and 41). It was to this issue Judge Wollenberg referred when he ruled on June 12th that:

Plaintiff's motion to strike all defenses and objections in defendants' answer is also granted. This Court has concluded Congress did not intend 42 U.S.C. 2018, *upon which defendants ground their defenses*, to prevent the AEC from condemning the easement in question. Under the circumstances of this case, the Court has further concluded that plaintiff has not violated any rights of defendants by such taking. (R. Vol. 1a 85, emphasis added)

Subsequently, on June 16th, counsel for the objecting defendants and for the Government appeared before Judge Wollenberg again and the Government requested, and the Court granted, an Order giving the Government complete possession of the easement concerned, to the extent of the estate condemned (R. Vol. 1a 88). Counsel for the Government further informed the Court that counsel for defendants had made public statements to the effect that, in spite of the Court's ruling, the Town of Woodside would arrest anyone attempting to construct this line. The Government requested the Court to issue an order restraining defendants and/or their agents from interfering with the Government's possession of this easement (R. Vol. 2, pp. 56 and 57). Mr. Austin Clapp, who was representing the objecting defendants during this hearing, confirmed this threat in open court, but went on to state that all the defendants desired was to seek a means to obtain appellate review of the Government's right to condemn. Mr. Clapp stated, however, that if the Court would amend his June 12th Order to include a 28 U.S.C. 1292(b) recitation, the arrest would not be necessary (R. Vol. 2, p. 65). On June 17th the Court below amended its June 12th Order to include a 1292(b) recitation (R. Vol. 1a 86), and on June 26th Mr. Clapp filed his Petition in this Court. Appellee filed an answer to appellants' Petition on July 10, 1964, and this Court issued its Order granting leave to appeal on July 22, 1964. It should also be mentioned that even though defendants Jane F. and James Carrigan objected below and did in fact file a

Notice of Appeal, on October 1, 1964 these defendants moved for and were granted an order allowing them to withdraw their appeal.

ARGUMENT

INTRODUCTION

Prior to a discussion of the merits on the issue here involved it was felt that a few preliminary comments were needed.

Appellee recognizes that a strong argument could undoubtedly be advanced to the effect that appellants' arguments concerning the alleged limitations of Section 2018 are premature and improper in this condemnation proceeding. Certainly appellants' contention that Section 2018 limits the general condemnation authority of AEC is, at best, tenuous. The contention that Section 2018 prohibits AEC from constructing this transmission line contrary to local ordinances is obviously an argument which would receive more serious consideration if urged in connection with an injunction or similar proceeding directed to the method of construction and operation of this line.

Appellee, however, is most anxious to avoid further delay in this matter; wherefore, appellee, as it stated in the Court below, does not desire to do more than inform the Court that it is aware of this situation and is willing to waive this position or argument and

proceed to meet the merits of appellants' objections, with a respectful request that the Court do likewise.⁸ However, in order for the Court to reach appellants' objections here, it is submitted that certain additional facts must be furnished. Appellee, therefore, is willing to make the same assumptions, arguendo, that it made in the Court below, i.e., that:

(1) The AEC will proceed to construct this transmission line without applying for a use permit from either the County of San Mateo or the Town of Woodside.⁹

(2) That AEC will construct an overhead transmission line on the easement condemned; and

(3) That the actions of the Town of Woodside in effecting a temporary ordinance immediately prior to this condemnation prohibiting overhead transmission lines and that of the County of San Mateo in revoking a use permit previously approved for this line, were in good faith and not

⁸It is imperative to the AEC that power be available to this project in the immediate future in that construction has almost been completed. Obviously a complex of this size without the necessary power to operate it will be almost completely useless. Wherefore, AEC does not desire that this matter be determined on a technicality which may afford an opportunity for further delay in a collateral proceeding. It is the desire of appellee that this matter be set to rest at this time.

⁹It is to be noted here that the City of San Mateo has no ordinance requiring that transmission lines be placed underground. Thus, in order to be deemed in violation of a San Mateo ordinance concerning transmission lines, it must be presumed that AEC will not apply for a use permit required by Section 6500(b) of the San Mateo County Ordinances.

solely for the purpose of attempting to come within the purview of Section 2018.¹⁰

Turning now to the format of this brief, counsel for appellee, in attempting to organize argument herein, found it almost impossible to present an orderly and cogent argument which concurrently presented appellee's position and refuted that expressed in appellants' brief (it is suggested that this difficulty is due to appellants' propensity to discuss everything but the basic issue here concerned); wherefore it was concluded that it would be best to first present the Court with appellee's reasoning and authorities in support of its position and to thereafter devote a separate part to rebutting pertinent sections of appellants' brief. This, then, is the procedure followed herein.

PART I

ARGUMENT IN SUPPORT OF APPELLEE'S POSITION

A. Agencies of the Federal Government are not subject to state or local control unless Congress has so decreed.

The Federal Government's sovereign power of eminent domain is in no way subject to the will or consent of a state or local governmental body.

It has not been seriously contended during the argument that the United States government is

¹⁰In this latter connection it must be emphasized that appellee is of the opinion that much could be said concerning the circumstances and effect of these actions by appellants County of San Mateo and the Town of Woodside. Such a discussion, however, would unduly lengthen and complicate the present proceedings, and is really unnecessary for a determination of the present issue.

without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. *These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. . . .* If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.

* * *

If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. (Emphasis supplied)

Kohl v. United States, 91 U.S. 367, 371 (1875);

Also see:

United States v. Carmack, 329 U.S. 230 (1946).

In addition to the supremacy of its eminent domain power, the general sovereign immunity of the Federal Government, its agencies and instrumentalities, from state or local control of its governmental functions is also so clear as to need no lengthy discussion here.

AEC, therefore, as an agency of the Federal Government, wears the cloak of sovereign immunity, and as such, its activities are generally deemed free from regulation or control by any state or local governmental body. See e.g.: U.S. Const. Art. VI; *Johnson v. Maryland*, 254 U.S. 51 (1920); *Arizona v. California*, 283 U.S. 423 (1930); *Mayo v. United States*, 319 U.S. 441 (1942).

Obviously, however, it lies within the power of Congress to submit a federal agency to certain regulations or control by a state.

Mayo v. United States, supra, p. 446.

Unquestionably, therefore, the activities of AEC as a United States governmental agency, in connection with the construction and operation of SLAC, are wholly immune from regulation or control by local governmental bodies, *unless* it can be established that Congress has indeed directed that AEC subject itself thereto.

Wherefore, in order to determine whether AEC has been so directed or limited by Congress, it is, of course, necessary to examine and consider the terminology and effect of the Congressional enactments conferring authority upon AEC in the field in question, i.e., the authority to exercise the power of eminent domain and to construct the transmission line in question.

B. Congress has conferred upon AEC broad powers to exercise eminent domain and to construct such facilities as it deems necessary.

A review of the purposes and policies set forth in the Atomic Energy Act of 1954 (Act of August 30, 1954; 68 Stat. 921; 42 U.S.C. Sections 2011-2296; hereinafter referred to as Act of 1954) reveals that Congress determined that the Federal Government, through AEC, was to exercise exclusive control over the development and use of atomic energy and special nuclear material for all purposes (42 U.S.C. Sections 2011-2013). To effectuate this purpose, Congress conferred upon AEC authority to, *inter alia*, license the use of nuclear energy for industrial or commercial purposes (42 U.S.C. Sections 2131-2133); and further, Congress not only authorized AEC to promote and conduct research in the nuclear field, but *directed* that AEC do so (42 U.S.C. Sections 2051-2053).

There can be no question as to AEC's general authority to construct facilities and to exercise the sovereign power of eminent domain in the performance of its function. In this regard, the Court's attention is directed to the following pertinent provisions of the Act of 1954:

42 U.S.C. 2201:

In the performance of its functions the Commission is authorized to

* * *

(e) acquire such material, property, equipment, and facilities, establish or construct such buildings and facilities, and modify such build-

ings and facilities from time to time, as it may deem necessary . . .

* * *

(g) acquire, purchase, lease, and hold real and personal property, including patents, as agent of and on behalf of the United States . . .

42 U.S.C. 2222:

Proceedings for condemnation shall be instituted pursuant to the provisions of sections 257 and 258 of Title 40, and section 1403 of Title 28. Sections 258a-258e of Title 40 shall be applicable to any such proceedings.

This broad authority to condemn is further supplemented by the following provision of 40 U.S.C. Section 257:

In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so . . .

In addition to the foregoing general authorizations, the statutes which authorized funds for SLAC specifically provide that the money authorized is “. . . for acquisition or condemnation of any real property or facility or for any plant or facility acquisition, construction . . .” (Acts of May 13, 1960 and Sept. 26, 1961, *supra*).

The Supreme Court, in referring to similar authority conferred by Congress upon the office of the Federal Works Administrator, characterized such broad authority as “. . . a general authorization which carries with it the sovereign’s full powers except such as are excluded expressly or by necessary implication.” *United States v. Carmack*, supra, at 243.

The issue in the *Carmack* case was also similar to that in the instant case for the Court was there considering whether the Federal Government agencies involved had sufficient statutory authority to condemn the land in question. In upholding the Government’s right of condemnation in the circumstances presented, the Court stated, at page 236:

Far removed from the time and circumstances that led to the enactment of these statutes . . . this Court must be slow to read into them today unexpressed limitations restricting the authority of the very officials named in the Acts as the ones upon whom Congress chose to rely.

1. **There is no express limitation upon AEC’s authority in the Act of 1954.**

Certainly, in the instant case, nothing in the Act of 1954 has been called to the Court’s attention, by appellant, which contains an express limitation upon the authority of AEC to condemn this easement or to construct the transmission line facility in question; nor can any such express limitation be found. Wherefore, in order to find some support for their contention, appellants are forced to urge that Section 2018

contains a “necessary implication” that AEC’s otherwise broad authority is limited in the present situation. Here then, is the gravamen of this appeal. For it is quite obvious from the foregoing authorities that absent such an implication, AEC is clearly not subject to appellants’ local ordinances and can proceed with this condemnation and the construction of the transmission line with complete immunity from local whims and control. It is, of course, appellee’s contention, and the lower Court’s ruling, that no such “necessary implication” can be found or justified from the provisions of Section 2018; and, it is submitted, the following considerations wholly support appellee’s position and the lower Court’s ruling.

2. No “necessary implication” limiting AEC’s authority can be concluded from Section 2018.

The terminology of Section 2018 is brief and concise—it merely states:

Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power.

In attempting to interpret a congressional statute, it is, of course, helpful and proper to consider pertinent legislative history. The legislative history of Section 2018 (originally Section 271 of the Act of 1954) is relatively sparse, but what there is clearly reveals the purpose and intent of Congress in the enactment of this statute. The Court’s attention is directed to the following pertinent excerpts from the comments

of Senator Bourke B. Hickenlooper (the Senate sponsor of the Act of 1954) which were made during Senate debate on the proposed provisions of the Act of 1954:

We take the position that electricity is electricity. Once it is produced it should be subject to the proper regulatory body, whether it be the Federal Power Commission in the case of inter-state transmission, or State regulatory bodies if such exist, or municipal regulatory bodies. We feel that there is no difference and that it should be treated as all other electricity which is regulated by the public.

I call special attention to section 271 of the proposed act, which says:

“Sec. 271. Nothing in this act shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power.”

That is designed to keep the regulatory authority exactly as it is now, traditionally and under the law.

100 Cong. Rec. 11567, July 26, 1954.

What section 271 does is to make clear that this act does not interfere in any way with the jurisdiction of the Federal Power Commission over such activities or with State agencies where they have jurisdiction, or with local agencies where they have jurisdiction.

It is not an authority given in a negative way. It is a positive negation of any intent by this statute to interfere with the existing laws and the exist-

ing authorities, State and Federal, that have to do with electricity.

* * *

We do not back into it. We are very careful in this bill not to attempt to write into it affirmative law which may have to be interpreted by the courts, but merely to say that the present existing authority shall not in any way be interfered with in the regulation of interstate transmission of electrical energy, in that general field. We make it very clear that we do not disturb existing law.

* * *

These licensees are private operators. They produce electric energy. Whether they produce it partly with uranium, partly with corn cobs, or partly with coal does not make any difference. So far as the fact that they produce electric energy is concerned, that electric energy which goes into interstate commerce is under the control and jurisdiction and regulation of the Federal Power Commission under the proposed act, under section 271.

100 Cong. Rec. 11709, July 27, 1954.

We say that nothing in this act shall interfere with or affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale or transmission of electric power. We say that this act does not interfere with the rights and the power and the authority of any Federal, State, or local regulatory body whatever; and the power and the authority which may be there now for the transmission of electricity or the generation of electricity or whatever the authority may be is not changed.

* * *

There was a move on the part of the committee to put this section 271 in the bill as a safeguard and as an assurance that the existing authority of the Federal Power Commission or the Federal law or agency and the existing authority of the State agencies and the existing authority of local agencies, whatever they may be in connection with the transmission of electric energy, would not be disturbed or interfered with in any way.

100 Cong. Rec. 11710, July 27, 1954.

We say in this act that the same rules and regulations, power and authority of the Federal Government, or of the local and State agencies, that exist now over the transmission of electric energy in interstate commerce shall obtain so far as any licensee is concerned. That is only a precaution. It would obtain if we never had that provision in the law. Even the provision of section 271 is not necessary in the law, in my opinion, for the Federal Government to assume jurisdiction over the transmission of electricity in interstate commerce by a licensee. We put section 271 in there as an assurance that the existing authority is not disturbed.

* * *

There cannot be any dispute under the language of the present bill because it specifically says that this bill does not in any way touch existing authority. That goes right on, and it exists just as it was before. We have gone to the trouble in this act—though I do not think it is necessary—of so stating for clarification.

100 Cong. Rec. 11711-11712, July 27, 1954.

Thus the legislative history of Section 2018 reveals that Congress was obviously concerned that the broad powers being conferred upon AEC to exercise exclusive control over the development and use of atomic energy which, as previously noted, included the right to license the use of nuclear materials for industrial or commercial purposes, might be misconstrued as an authorization to AEC to control all phases and by-products of such activities, such as the right to regulate and control the "generation, sale, or transmission" of electrical energy resulting from the use of nuclear materials. The legislative history further reveals that the clear purpose and intent of Congress in enacting Section 2018 was merely to assure that any electrical energy produced by nuclear means and transmitted for sale or commercial use *from* a nuclear plant would be subject to the same regulatory controls as electrical energy produced by conventional means.

The facts of the instant case do not even fall into the same category as those contemplated by Section 2018. It is to be recalled that the project which gave rise to the present proceedings is a *research* project and it will not, therefore, result in the generation, or transmission, from said project for sale or commercial use, of electrical energy generated by nuclear means. The sole purpose of this condemnation action is to obtain an easement to construct a transmission line which will carry conventionally generated electricity to the project as a utility necessary for its operation.

It must be concluded, therefore, that no "necessary implication," or for that matter, even the slightest

suggestion, can be found from the provisions of Section 2018, or from its legislative history, that Congress intended thereby to limit the authority of AEC to exercise its otherwise broad powers of eminent domain, and to construct such facilities as it deems necessary.

C. Congress has in effect ratified appellee's contentions here.

This Court has recognized that in certain circumstances it can be said that Congress has "ratified" a particular statutory interpretation or construction. In *United States v. Kennedy*, 278 F.2d 121 (C.A. 9, 1960) a question had been raised concerning the authority of the Secretary of the Interior to condemn certain lands in Mount McKinley National Park in Alaska. It was there contended by the landowner that the Secretary of Interior had not been granted specific statutory authority to condemn the land in question. It was the Government's contention, however, that even though Congress had not specifically authorized this particular condemnation, Congress had appropriated to the Secretary of the Interior general acquisition funds with full knowledge of the Secretary's prior practice of utilizing such funds to acquire land not included within the specific authorization statute. In upholding the Secretary of the Interior's authority to condemn in these circumstances, the Court stated: "The fact that Congress continued the same appropriation with knowledge of this administrative understanding and practice, constitutes virtual ratification of the administrative construction." (Id. at p. 126) In accord see: *Boesche v. Udall*, 373 U.S. 472, 483

(1962); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1957); *Fleming v. Mohawk Co.*, 331 U.S. 111, 116, 119 (1946); *Brooks v. Dewar*, 313 U.S. 354, 361 (1941); *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301-302 (1937).

It is submitted that, in essence, Congress has also "ratified" the Government's present interpretation of Section 2018 as to AEC's authority to condemn this easement and construct the transmission line contrary to local ordinances. In this regard the Court's attention is respectfully directed to the following: The Act of 1954, *inter alia*, continued a congressional committee called the Joint Committee on Atomic Energy which is charged with the authority and duty to:

. . . make continuing studies of the activities of the Atomic Energy Commission and of problems relating to the development, use, and control of atomic energy. . . . The members of the Joint Committee who are Members of the Senate shall from time to time report to the Senate, and the members of the Joint Committee who are Members of the House of Representatives shall from time to time report to the House, by bill or otherwise, their recommendations with respect to matters within the jurisdiction of their respective Houses which are referred to the Joint Committee or otherwise within the jurisdiction of the Joint Committee. (42 U.S.C. Section 2252)

Pursuant to their authority and duty, the Joint Committee on Atomic Energy, as previously mentioned herein, held a hearing on January 29, 1964 to determine all of the facts concerning the controversy that

had arisen involving this transmission line problem at the SLAC project. Evidence was submitted to the Committee during this hearing by all interested parties so that the members thereof received a full and complete picture of the entire problem. The hearing was subsequently printed and copies thereof are readily available.¹¹ One of the prominent members of this Committee who was present during the aforesaid hearing, is Congressman Craig Hosmer from California. Congressman Hosmer has been a member of this Joint Committee for many years and was a member during its consideration of the Atomic Energy Act of 1954.¹² Subsequent to the January 29th hearing, during the House Debate on the 1964-65 AEC appropriation bill, Congressman Hosmer informed the Members of the House of Representatives of the facts concerning this problem, including the fact that condemnation proceedings had been instituted. Congressman Hosmer's remarks contain a very helpful and concise statement of the background of this problem. For the Court's convenience, Congressman Hosmer's remarks which appear at pages 9,974 through 9,976 of the Congressional Record-House for May 7, 1964, have been set forth in full in the Appendix hereof. The Court's particular attention, however, is directed to the last portion of Congressman Hosmer's remarks wherein he states:

¹¹Hearing of January 29, 1964, *supra*.

¹²This Committee was originally established by the Atomic Energy Act of 1946; Act of August 1, 1946, 60 Stat. 772, and merely continued by the Act of 1954.

The AEC's authority under the Atomic Energy Act of 1954 to acquire a right-of-way by eminent domain is clear. Moreover, the intent underlying the authorization and appropriations acts which provide for the Stanford project, support the Commission's authority in this regard. Some local residents have questioned whether section 271 of the act limits the Commission's authority in this respect. I will simply say that section 271 was intended to apply to regulatory controls over the generation of electricity by nuclear power. It has nothing whatever to do with the present situation.

Obviously, therefore, through the hearing of January 29, 1964, and Congressman Hosmer's report to the House, Congress had been informed of the existence of, and facts concerning, this controversy, including the position of AEC as to their authority to proceed contrary to local ordinances.

Subsequently, Congress proceeded to approve AEC's 1964-65 appropriations wherein Congress authorized general construction funds (which included sums for SLAC), approved certain new projects and other expenditures and then proceeded to specify certain project "limitations" and "rescissions" (Pub.L. 88-332, approved June 30, 1964, 78 Stat. 227; Pub.L. 88-511, approved August 30, 1964, 78 Stat. 682). None of the limitations or rescissions contained in the 1964-65 appropriation act are directed to this transmission line facility or any other aspect of the SLAC project.

It is submitted, therefore, that in these circumstances it can and should be concluded that Con-

gress has “ratified” the contention that Section 2018 is not applicable to the present situation and that AEC has full power and authority to proceed with this condemnation and the construction of the transmission line in question.

PART II

REBUTTAL OF APPELLANTS’ ARGUMENT

INTRODUCTION

As stated at the outset of this Brief (Introduction, *supra*) appellee is of the firm belief that much of appellants’ brief contains “arguments” or “issues” which are wholly irrelevant to the sole issue presented in this appeal; wherefore, it is suggested that a detailed rebuttal of all the minor points raised or discussed in appellants’ argument would be of mere academic interest and would be of little assistance to the Court’s deliberation upon the issue here concerned. In view of this belief, then, counsel for appellee, in the discussion to follow, has attempted to minimize comment as to those portions of appellants’ argument which it is felt are not relevant to the issue.

A few general comments concerning the format of appellants’ brief might be helpful at this point. The argument portion of appellants’ brief appears to commence with Part III (Br. 7-25) and proceeds through Part IV (Br. 25-28). The argument appears to be divided into two main parts, designated Part III and Part IV, each with several sections. This rebuttal will attempt to follow the aforesaid format.

A. Part III of appellants' brief.

1. Section A (Br. 7-9).

This portion of appellants' brief discusses an alleged "hands-off" policy of Congress with respect to local regulation of electricity. In this regard appellants cite Section 824(b) of the Federal Power Act of 1935 (16 U.S.C. Sections 791-828) and two cases which discuss the Federal Power Act.¹³ This is one of the portions of appellants' brief which appellee deems to be irrelevant to the issue here. Appellee can in no way perceive how a discussion of the jurisdiction of the Federal Power Commission over interstate electrical facilities can be pertinent to a resolution of the issue of whether AEC's authority is in this case limited by 42 U.S.C. Section 2018.

2. Section B (Br. 9-13).

Appellants here merely set forth a portion of the legislative history of Section 2018, and then conclude therefrom that "... it is clear that Congress was satisfied with, and intended to continue, undisturbed, *existing State and local authority* over all electricity, including that produced by atomic means." (Br. 12. Emphasis supplied)

Rather conspicuous by its omission from appellants' conclusion here is any reference not only to the intent

¹³One of the cases cited by appellants is *Southern Cal. Edison Co. v. Federal Power Commission*, 310 F.2d 784, a 1962 decision of this Court. Although appellee does not believe the decision and appellants' discussion thereof to be pertinent to this case, it should be noted that appellants erroneously report that certiorari had been denied. In fact, the Supreme Court not only granted certiorari (372 U.S. 958), but they *reversed* this Court's decision at 376 U.S. 205 (1964).

but the specific statement of Congress to preserve “. . . the authority of any *Federal*, State or local agency with respect to the generation, sale or transmission of electric power.” (Emphasis supplied. 42 U.S.C. Section 2018; also see many references thereto in the legislative history of Section 2018, Part I, Section B, subsection 1, *supra*.)

It is submitted that appellee’s discussion hereinabove of the history, intent and purpose of Section 2018 clearly establishes its inapplicability to the present case (*Ibid*).

3. Section C (Br. 13-16).

This section of appellants’ brief contains a rather strange discussion which is ostensibly designed to persuade the Court of the desirability and practicability of placing the transmission line here in question underground. In the process of this discussion appellants cite many decisions of various state courts and quasi-judicial bodies.

Certainly, there can be no doubt that the question of whether this AEC transmission line should be overhead or underground is not before this Court under any theory. The only issue here is whether AEC is bound by local ordinances in this proceeding, whatever those ordinances might direct. The fact that the Court may or may not agree with the intent and purpose of the ordinance is obviously immaterial.

Mention should also be made that since this is a Federal condemnation proceeding, it is governed solely by Federal law and the state decisions and statutes

cited by appellants in their brief are neither controlling nor persuasive. *United States v. 93.970 Acres of Land*, 360 U.S. 328 (1959); 3 Barron & Holtzoff, Fed. Prac. & Proc., Section 1516, p. 326 of 1964 Supplement.

In the last paragraph of this portion of appellants' brief (Br. 16) appellants make reference to *United States v. Oklahoma Gas and Electric Co.*, 297 F. 575 (CA 8, 1924), and state that, in effect, the Government's position there was nearly identical with that taken in this case. Aside from the fact that the *Oklahoma* decision is, in all likelihood, no longer valid law (cf. *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1957); and *Paul v. United States*, 371 U.S. 245 (1962)) it is submitted that no similarity exists whatsoever between the *Oklahoma* case and the instant case. The *Oklahoma* case involved a contract between the Federal Government and a public utility for electrical energy to be supplied to a Government facility; it did not involve a question of the authority of the Government to condemn or to construct a portion of the Government facility itself, as is the fact in the instant case.

As stated several times hereinabove, SLAC is *not* a nuclear plant designed for the purpose of generating and selling electricity. Wherefore, AEC has no intention whatsoever of interfering with the normal regulation and control of commercial electricity by the proper regulatory bodies, local or Federal; in fact, AEC's contract with PG&E specifically provides for approval by the California Public Utilities Commis-

sion (R. Vol. 1a 32). Likewise, however, AEC is not bound to and has no intention of submitting its own activities, incident to SLAC, to the jurisdiction of any such local regulatory bodies.

4. Section D (Br. 16-19).

This portion contains a discussion of a series of cases which appellants allege uphold the contention that "... the burden of additional cost to the Government by reason of local regulations would not cause such regulations to be inapplicable" (Br. 17). The reference to cost pertains, of course, to the fact that an underground line in the instant case would cost several million dollars more than an overhead line.

The cases cited in this portion of appellants' argument, with the exception of *Paul v. United States*, supra,¹⁴ all concern factual situations involving activities of contractors doing business with the Federal Government. The United States, or an agency or instrumentality thereof, is not a party to any of the cases here relied upon by appellants. The Courts, even in the very cases cited by appellants, have consistently recognized the distinction between state regulation of contractors doing business with the Federal Government and attempted regulation of an agency, officer or instrumentality of the Federal Government itself. In discussing this distinction, the Court, in *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania*, 318 U.S. 261 (1942), cited by appellants at page 17 of their brief, stated at page 269:

¹⁴As appellants admit (Br. 17), the decision in the *Paul* case does not really support their present contention.

We may assume also that, in the absence of Congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. *Ohio v. Thomas*, 173 U.S. 276; *Johnson v. Maryland*, 254 U.S. 51; *Hunt v. United States*, 278 U.S. 96; *Arizona v. California*, 283 U.S. 423. But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions.

Likewise, in the next case cited by appellants (Br. 17), *James Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1939), the Court said at pages 103-104:

But the authority of state laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way.

An excellent discussion of these cases and the distinction to be applied between contractors doing business with the Federal Government and agencies of the Federal Government itself appears in the recent case of *Public Utilities Commission of California v. United States*, *supra*. This case involved a California statute to be enforced by the Public Utilities Commission of California, which, among other things, attempted to regulate Federal negotiating practices concerning rates for the shipment of Government property within the State. In deciding that the Federal Government

was immune from such control, the Court reviewed the cases concerning sovereign immunity in these circumstances, and in so doing stated, at pages 543-4:

The question is whether California may impose this restraint or control on federal transportation procurement.

We lay to one side these cases which sustain nondiscriminatory state taxes on activities of contractors and others who do business for the United States, as their impact at most is to increase the costs of the operation. See, e.g., *Esso Standard Oil Co. v. Evans*, 345 U.S. 495; *Smith v. Davis*, 323 U.S. 111; *Alabama v. King & Boozer*, 314 U.S. 1; *James v. Dravo Contracting Co.*, 302 U.S. 134. We also need do no more than mention cases where, absent a conflicting federal regulation, a State seeks to impose safety or other requirements on a contractor who does business for the United States. See, e.g., *Baltimore & Annapolis R. Co. v. Lichtenberg*, 176 Md. 383, 4 A. 2d 734, appeal dismissed, 308 U.S. 525; *James Stewart & Co. v. Sadrakula*, 309 U.S. 94. *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, can likewise be put to one side. There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation "imposes no prohibition on the national government or its officers." *Id.*, at 270. Here, however, the State places a prohibition on the Federal Government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear. The conflict is as plain as it was in *Arizona v.*

California, 283 U.S. 423, 451, where a State sought authority over plans and specifications for a federal dam, in *Leslie Miller, Inc. v. Arkansas*, supra, where state standards regulating contractors conflicted with federal standards for those contractors, and in *Johnson v. Maryland*, 254 U.S. 51, where a State sought to exact a license requirement from a federal employee driving a mail truck. The conflict seems to us to be as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve. As Chief Justice Marshall said in *McCulloch v. Maryland*, 4 Wheat. 316, 427,

“It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.”

It is obvious, therefore, that since we are here concerned with the direct activities and functions of the Federal Government itself, through its agency the AEC, the cases cited by appellants in this portion of their brief are wholly inapplicable to the present issue.

5. Section E (Br. 19-21).

This section has two subdivisions. Subdivision (1) thereof discusses Section 2021(k) of 42 U.S.C., which appellants allege indicates Congressional intent to closely limit the powers of AEC (Br. 19). Section 2021 is clearly devoted to a consideration of a rather unique problem associated with the use of nuclear materials—radiation hazard. Section 2021 authorizes and directs AEC to assume certain responsibility and

regulation, in cooperation with the States, to insure adequate public protection from radiation hazards incident to the use of nuclear materials. Here again Congress was obviously concerned that the broad powers conferred upon AEC in the field of radiation hazard might be misconstrued. Wherefore, to make it absolutely clear that the regulatory authority granted to AEC by Section 2021 was directed solely to radiation hazards and not to other functions of private or state owned facilities utilizing nuclear material under license from AEC, Congress stated, in part (k) of Section 2021:

Nothing *in this section* shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards. (Emphasis supplied)

Since the present case does not involve a question of radiation hazard or the regulatory powers of AEC pursuant to Section 2021—appellee fails to see the relevancy of Section 2021(k) to the present issue.

Appellants allege, in subsection (2) of this section E, that “. . . there is evidence in the statutory history that Congressional approval was predicated on the ability to build the center [SLAC] without condemnation” (Br. 21).

This bare allegation is unsupported by argument or authority and is predicated solely upon some innocuous statement made by a witness in one of the many Congressional hearings on this proposed project. Here again we have an example of one of the many “issues” which have been sprinkled into appellants’

brief. It is submitted that the absurdity of this "issue" is so self-evident as to need no further comment.

6. Section F (Br. 22-25).

In this section appellants contend that Congress has "... enacted positive legislation supporting the purposes of local legislation preserving open spaces and scenic beauty" (Br. 22). Appellants then proceed to discuss several other Congressional statutes totally unrelated to the activities and authority of AEC. The whole point of this discussion by appellants seems to be directed to an attempt to come within the purview of the Supreme Court decision in *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1959), cited and discussed by appellants at page 24 of their brief.

It is certainly true that the Supreme Court, in the *Huron* case, did hold that a private corporation engaged in operating ships owned by it, but Federally licensed, was subject to a municipal ordinance on air pollution while its ships were docked within the municipal boundaries; *but*, in so holding, the Court specifically found: (a) "... there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved" (at p. 446); and, (b) "The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce" (at p. 447).

Appellants are obviously once again trying very desperately to circumvent the fact that we are here

concerned with the direct activity of AEC, an agency of the Federal Government that clearly *does* have immunity from local regulation.

B. Part IV of appellants' brief.

1. Section A (Br. 26-27).

Appellants here contend that Congress may, by statute, limit the authority of a Federal agency to exercise the power of eminent domain; this is one of the very few contentions in appellants' brief with which counsel for appellee can agree! Appellants, however, then proceed to discuss the recent decision in *Maiatico v. United States*, 302 F.2d 880 (CA DC 1962) and they attempt to draw an analogy between the facts and statutes in that case and those in the instant one.

The *Maiatico* case involved a condemnation by the General Services Administration of an office building within the District of Columbia. Due to the unique situation presented by the number of public buildings existing and the obvious need for future public buildings within the geographic limitations of the District of Columbia, Congress had enacted certain enabling statutes which placed very strict conditions and limitations upon the purchase or acquisition of property by GSA within the District of Columbia. Without going into all the details of the statutes concerned and the various contentions proffered in the *Maiatico* case, suffice it to say that the Court there found that even though Congress had authorized a general ap-

propriation to GSA for public buildings within the District of Columbia, GSA was not thereby excused from the conditions and requirements of other pertinent statutes, which included the requirements of prior approval by the Committee on Public Works of the House and Senate and location within a specified "taking area."

Appellants suggest an analogy between the instant case and the strict limitations and conditions imposed by Congress upon acquisitions within the District of Columbia; appellants, however, are unable to point to any statute, pertaining to the authority of AEC, which contains any such specific conditions or limitations upon the otherwise broad powers of eminent domain conferred upon AEC by Congress. The reason for this omission in appellants' argument is obvious—there have been no such conditions or limitations imposed upon AEC's authority to exercise the sovereign power of eminent domain. The *Maiatico* case is clearly inapplicable here.

2. Section B (Br. 27-28).

In this last portion of their argument appellants set forth a rather confused or confusing discussion of an alleged "issue" of public use. Appellee submits that the record in this matter establishes unequivocally that there is no such issue here presented for determination. As stated several times hereinabove, the *sole* issue here concerns an alleged limitation upon AEC's *authority* to condemn this easement and to construct the transmission line thereon.

CONCLUSION

It is submitted that the pertinent facts in this matter can be very briefly summarized as follows:

Pursuant to the express direction and authority of Congress, AEC is currently in the process of constructing a \$114 million nuclear *research* complex upon the campus at Stanford University. Because of what AEC deems to be unreasonable demands by local governmental bodies, conventional electrical power cannot be supplied to this complex by the local utility company in a manner and for a cost which, in the opinion of AEC, is in the best national interests. Wherefore, as clearly authorized by Congress, AEC has found it necessary to exercise its discretion and has called upon the sovereign powers of immunity and eminent domain to accomplish the requisite purpose of providing electrical power to this project.

It is likewise submitted that the law applicable to these facts can also be briefly summarized as follows:

Congress has established AEC as an agency of the Federal Government to perform certain well defined functions of the Federal Government. To this end Congress has conferred upon AEC full and *unrestricted* power of eminent domain. The applicable law in these circumstances has been clearly and concisely stated by the Supreme Court in *Mayo v. United States*, *supra*, at p. 445:

Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is

necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle. Article VI. A corollary to this principle is that the activities of the Federal Government are free from regulation by any state. No other adjustment of competing enactments or legal principles is possible.

Wherefore, it is respectfully submitted that the Order of the lower Court upholding AEC's right to exercise the power of eminent domain in these circumstances, and to construct the necessary transmission line contrary to local ordinances should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES R. RENDA

Attorney for Appellee

(Appendix Follows)

Appendix.



Appendix

REMARKS OF CONGRESSMAN CRAIG HOSMER AS CONTAINED
IN 110 CONGRESSIONAL RECORD—HOUSE, 9974-76 FOR
MAY 7, 1964.

Mr. Hosmer. Mr. Chairman, I would like to say a few words about a proposal to require the AEC, at its own expense, to transmit electric power for the operation of the Stanford accelerator by means of underground transmission lines. The facts can be set forth plainly and clearly. I believe that after the facts have been stated, calm reason and good judgment will lead reasonable men to reject this proposal.

Background of the Stanford Linear Accelerator

First, I would like to say a word about the background of the Stanford project. The Stanford linear accelerator was authorized by Congress in 1961 at an estimated total cost of \$114 million. The accelerator is now under construction on the campus of Stanford University at Palo Alto, Calif. When completed in 1966, it will be the highest energy linear accelerator in the world.

The Stanford accelerator will be a unique research facility which qualified scientists throughout the United States and the world will employ in their search for the most fundamental knowledge of nature's basic building blocks. We expect that this facility will contribute to man's understanding of the fundamental physical aspects of the universe. It should do much to enhance the scientific and technological stature of the United States.

Although its initial construction costs will be about \$114 million, it is expected that \$20 million a year will be spent in the operation of this facility. A staff of approximately 700 will be required to run it. I believe I have said enough to indicate that the very presence of this facility, from the standpoint of prestige and economic value, will be a major asset to this area of the Nation.

Electric Energy Requirements

The Stanford accelerator will require large amounts of electrical energy, not only for the operation of the accelerator itself, but for many items of auxiliary equipment that are associated with the research to be conducted at the facility. In its initial stages, approximately 80,000 kilowatts of electric energy will be required. Ultimately, if it is used at its full design level, up to 300,000 kilowatts may be required.

In January 1963, the Pacific Gas & Electric Co. signed an agreement with the AEC to furnish electrical power for the construction and operation of the accelerator complex. Rates and terms were agreed to, all of which were conditioned on the utility's construction of an overhead transmission line which the company planned to build to the accelerator center. The estimated cost of this transmission line—a cost which would be picked up by the AEC in its rate payments—was \$668,000. The lines were to consist of two 300-megawatt circuits which would provide all the power the accelerator might require, plus the insurance of a backup circuit if the power over one circuit was interrupted. I would like to stress again that the cost

for constructing this transmission line, which will satisfy all of the foreseeable requirements for the accelerator complex, is \$668,000.

Shortly after the agreement with P.G. & E. was signed in January 1963, a problem developed in the community. Great pressures were exerted on the AEC by local residents to get the AEC to consent to the idea of building underground transmission lines. Applications by P.G. & E. for the construction of overhead transmission lines were repeatedly delayed by the city of Woodside and the county of San Mateo. Finally, the community action took the form of a complete refusal to permit P.G. & E. to serve the project unless this was done by an underground transmission line, for which the AEC would have to bear the extra cost.

Key Facts in the Dispute

I would like to clearly set forth the basic facts involved in this dispute between the local residents of Woodside, Calif., and the Atomic Energy Commission:

First, it must be borne in mind that the best electrical service from the standpoint of the project's needs happens also to be the cheapest. Steel towers with two 300-megawatt circuits would cost about \$668,000. This is not the prettiest installation—but it is the cheapest and the best.

Second. Over the past 5 months, the AEC has tried to negotiate a reasonable settlement of this problem with the local communities. AEC indicated that it would be willing to agree to a more attractive, al-

though more expensive, single pole overhead transmission line. The AEC even agreed to an underground line and to make a reasonable contribution to the extra cost entailed if the local communities would also make a substantial contribution to the extra cost involved. The AEC made this offer despite the fact that such a line would be considerably less beneficial to the project than an overhead line, in terms of power and reliability.

Third. Now, what cost differentials are involved between overhead and underground transmission lines?

First, consider the originally planned installation and twin 300-megawatt overhead transmission lines. As I have noted already, it would cost about \$668,000. If placed underground, the same lines are estimated to cost \$6,440,000.

There is a less adequate overhead installation with only a single 300-megawatt line which the AEC was willing to accept as a compromise. That would cost \$992,000. An equivalent underground line would cost \$3,644,000.

Finally, the AEC was willing to consider an underground line of 180 megawatts which might only satisfy the minimum needs of the project for the first few years of its operation. Such a line was estimated to cost \$2,640,000. Nevertheless, the AEC was willing to contribute to the extra cost involved if others would also bear a substantial part of the additional cost. No such compromise was acceptable to the officials of the town of Woodside and San Mateo County.

Fourth. Now, let us talk for a moment about the so-called conservation issue involved in this dispute. The proposal for the construction of overhead transmission lines has been variously characterized as “debauchery of the landscape” and “desecration” of one of nature’s last undisturbed areas.

I have traveled on several occasions in the area surrounding the Stanford campus. It is one of the loveliest areas of California and perhaps the Nation. One finds many beautiful homes placed on 3-acre minimum lots.

However, I also saw overhead transmission lines in the same area. As a matter of fact, I have been informed that between the date of its incorporation in 1957 and June 1963, 251 new wooden power poles were erected within the town of Woodside. From June 1963 to March 25, 1964, 26 additional poles were constructed. These new poles supplement 1,430 overhead power poles now within the city of Woodside. It is thus apparent that overhead transmission lines are no stranger to the residents of Woodside, Calif.

I would also like to call to the attention of the Members a letter from Dr. W. K. Panofsky, who is the director of the Stanford Linear Accelerator Center. Dr. Panofsky is himself deeply interested in conservation matters and states that he is a member of the Sierra Club—a prominent conservation organization in California. Nevertheless, Dr. Panofsky, in a recent letter to Senator Kuchel, a copy of which was furnished to the Joint Committee, stated:

I feel compelled to inform you that from the point of view of the disturbance of the landscape, the case made by the Woodside residents is a weak one; moreover, I cannot see how it can be considered a conservation issue at all. Under no circumstances can I see any justification in the actual situation for such terms as "debauchery of the landscape" "desecration," etc.

Finally, I would like to stress that the construction of overhead transmission lines to the Stanford project will involve the construction of only five additional poles through the city of Woodside. In short, Mr. Chairman, there really is no conservation issue here at all. The question is: "Is it worth a \$2 to \$5 million outlay by the Federal Government so that a few residents of a local community may enjoy an unhampered view of a horizon which is already cluttered with well over 1,500 electric energy transmission poles?"

Fifth. Finally, I would like to say a word about the precedent involved here. Keep in mind that there are no underground transmission lines in the town of Woodside or in the unincorporated areas of San Mateo County. There may be some underground distribution lines but these are much less costly than underground transmission lines. As a matter of fact, transmission lines are generally placed underground only in large cities.

If the Federal Government were forced by these local jurisdictions to adopt practices which are much more costly than those conforming to community, regional, or even national standards, then I can foresee

other communities attempting to force the Federal Government into the same posture. How will we justify the construction of overhead transmission lines to service future Federal facilities when the local residents near those facilities can point to Woodside and say, "See what you did for the people of Woodside—we demand at least equal treatment." I do not think that we are ready for this kind of a run on the Federal Treasury.

Background of Joint Committee Interest

The Joint Committee on Atomic Energy has had a longstanding interest in the Stanford project. Indeed, at one point the committee held up authorization of the project so that its cost estimates could be refined and sharpened.

In connection with the present dispute, the committee held hearings on January 29, 1964, at which all of the interested parties were afforded an opportunity to testify. All the facts were brought out at this hearing. In addition, the members of the AEC, the city of Woodside, the county of San Mateo, and Stanford University. Moreover, members of the Joint Committee have actually been out to the site to look into the situation first hand. This hearing entitled "Stanford Accelerator Power Supply" has since been printed and is available.

In our view, the Atomic Energy Commission has been sympathetic and reasonable in its efforts to negotiate a fair settlement.

When faced with the adamant attitude of the local officials, the AEC could do nothing but act under the authority granted by the Atomic Energy Act of 1954, as supplemented by the AEC authorization and appropriation acts, to acquire a right-of-way by eminent domain so that the Government could build a transmission line to bring power to the accelerator. The AEC's authority under the Atomic Energy Act of 1954 to acquire a right-of-way by eminent domain is clear. Moreover, the intent underlying the authorization and appropriations acts which provide for the Stanford project, support the Commission's authority in this regard. Some local residents have questioned whether section 271 of the act limits the Commission's authority in this respect. I will simply say that section 271 was intended to apply to regulatory controls over the generation of electricity by nuclear power. It has nothing whatever to do with the present situation.

Mr. Chairman, I believe that I have set forth the facts as clearly as I can. I shall be opposed to this proposal and I believe that on the basis of the facts in this case, others should arrive at a like judgment.

Nos. 19,373 and 19,374

United States Court of Appeals
For the Ninth Circuit

JOSEPH A. MAUN, as trustee, 1962 trust
for Alys Wunderlich Bachler, TOWN
OF WOODSIDE, et al., *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

No. 19,373

WILLIAM J. ADAMS and JANET K. ADAMS,
et al., *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

No. 19,374

Appeal from the United States District Court for the
Northern District of California,
Southern Division

APPELLANTS' REPLY BRIEF

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FILED

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FRANK H. SCHMID, CLERK

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Nos. 19,373 and 19,374

United States Court of Appeals

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JOSEPH A. MAUN, as trustee, 1962 trust
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No. 19,374

Appeal from the United States District Court for the
Northern District of California,
Southern Division

APPELLANTS' REPLY BRIEF

I

THE GOVERNMENT HAS CONCEDED THAT IT IS SUBJECT TO
REGULATION SO FAR AS THE SUPPLY OF ELECTRIC
POWER IS CONCERNED.

The key to this controversy has been provided by
the Government in its brief (pp. 35-36) when it says:

“... Wherefore, A.E.C. has no intention what-
soever of interfering with the normal regula-

tion and control of commercial electricity by the proper regulatory bodies, local or Federal; in fact, A.E.C.'s contract with P.G.&E. specifically provides for approval by the California Public Utilities Commission . . ."

but adds in the same breath (p. 36),

"Likewise, however, A.E.C. is not bound to and has no intention of submitting its own activities, incident to SLAC, to the jurisdiction of any such local regulatory bodies."

Freely translated, this amounts to a statement that "We are subject to such state or local regulation of the transmission of electricity as we choose to be subject to."

Is this really a matter of choice, or has the Government made a fatal admission? We think that it is an admission.

The Government concedes, as it must (brief, p. 19), that "... it lies within the power of Congress to submit a federal agency to certain regulations or control by a state."

Appellants say that Congress has done so in this case, and, by conceding that it is subject to rates approved by the California Public Utilities Commission, the Government agrees in part.

There is no inconsistency between *United States v. Oklahoma Gas and Electric Co.*, 297 Fed. 575, and *Penn Dairies Inc. v. Milk Control Com.*, 318 U.S. 261, on the one hand, and *Public Utilities Commission of California v. United States*, 355 U.S. 534, and *Paul v. United States*, 371 U.S. 245, on the other. In each

group, it is the intent of Congress which controls. And, if *Paul* controlled here, A.E.C. would not even concede that it must pay the California-fixed rates.

We think that A.E.C. construes 42 U.S.C.A. Sec. 2018 as authorizing state regulation of rates with respect to local sales of electric energy to it; we think that its acceptance of this construction is inescapably shown by its contract with P.G.&E.

The Government simply refuses to face the fact that regulation of electric transmission involves not only control of what a public utility does, and charges, but what the consumer does with the other end of the line.

We tried to make it clear in our opening brief that regulation of the consumer of electricity is a part of the total pattern of regulation of the "transmission of electric power."

This must be so, for otherwise, a public utility would build no lines, and include in its rate no charge for the construction of a line, letting the consumer build what it will, through the finest residential district, saying piously "we can not help what our customer does to reach our generating plant".

What the consumer builds adds a cost to the electricity, and is no more nor less if, in one case it is reflected in the utility's rate, and in the other is allocated by the consumer to the units of electrical energy purchased by it. Had P.G.&E. built an underground line to provide for potential demand before the A.E.C. came along, we are sure that the latter would have paid the rates, reflecting that cost, without all of this ridiculous kicking and screaming.

II

NO ACTION OF CONGRESS HAS ALTERED THE BASIC RESTRICTION ON A.E.C.'S AUTHORITY TO ACQUIRE PROPERTY.

A.E.C.'s basic authority to acquire property is contained in 42 U.S.C.A., *Chapter 23*. This chapter also contains Section 2018, providing:

“Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power.”

Parenthetically, we may remark that this section does not stand alone. It is necessary to consult the Federal Power Act, State laws, and local ordinances to put content into the restriction. We fail to see how any of these is irrelevant.

Authority to acquire property, therefore, is subject to the *express* limitation that it must not “affect the authority of any . . . local agency with respect to the transmission of electric power.”

Authority to acquire property, whether given in the basic act, or impliedly, by an appropriation which may be used “for the acquisition or condemnation of any real property . . .” (Appellee’s Brief, p. 21) is still subject to the unamended limitations of Section 2018.

The Government’s contention concerning “ratification” of the A.E.C.’s position (Appellee’s Brief, pp. 28-32) is specious.

Congressman Hosmer made a speech before the House adopted H.R. 10945, providing funds for A.E.C. We are unable to find in that bill the slightest

indication that Congress was dealing with the condemnation of a power line easement to serve SLAC. His speech was as irrelevant to the matter under consideration as would have been a speech defending motherhood. If a single Congressman can amend a law by making a speech not germane to a bill under consideration we would venture to say that there are few laws in effect today.

CONCLUSION

We submit that the Government has conceded that it is subject to regulation in this matter, and that the regulations of the Town of Woodside and of the County of San Mateo must be given effect.

Respectfully submitted,

AUSTIN CLAPP,

Of Counsel for Appellants.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAROL LEE CHAPMAN,

Plaintiff-Appellee
and Cross-Appellant,

vs.

FIRST INSURANCE COMPANY OF
HAWAII, LTD.,

Defendant-Appellant
and Cross-Appellee.

*See also
Vol. 3312*

PETITION FOR REHEARING

FILED
6-21-1939

RECEIVED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAROL LEE CHAPMAN,

Plaintiff-Appellee
and Cross-Appellant,

vs.

FIRST INSURANCE COMPANY OF
HAWAII, LTD.,

Defendant-Appellant
and Cross-Appellee.

PETITION FOR REHEARING

TO THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT AND THE JUDGES THEREOF:

CAROL LEE CHAPMAN, plaintiff-appellee and cross-appellant in the above-entitled cause, presents this her petition for rehearing of the above-entitled cause and in support thereof respectfully shows:

1. This court has held that Miss Chapman cannot assert the claim of Mrs. Brown and Mrs. Chase against the First Insurance Company for breach of a promise to defend. This holding is in direct conflict with the case law of the State of Hawaii. This court, in so holding, apparently overlooked that aspect of Yuen v. London Guar. & Acc. Co., 40 Haw. 213 (1953), which holds that an insured's judgment creditor may recover directly against an insurer on an estoppel

arising from facts independent of policy coverage. Furthermore, this Ninth Circuit holding is directly contrary to the law as summarized by the most recent statement in 8 Appleman, Insurance Law and Practice, § 4831 "Right to Sue Insurer - Liability Policies" (1965 Supp.).

2. The court has held that Miss Chapman cannot recover because the admitted detrimental and reasonable reliance of Mrs. Brown and Mrs. Chase upon First Insurance's promises would not support an estoppel in their favor extending coverage to the policy limit. To sustain a policy limit estoppel, this court apparently would require a detrimental reliance in an indemnity for loss sense. This holding, however, is directly contrary to the opinion of the Hawaii Supreme Court in Yuen v. London Guar. & Acc. Co., 40 Haw. 213 (1953), which held that the insured's judgment creditor - who could not conceivably be said to have detrimentally relied in an indemnity for loss sense - could recover the full judgment directly against the insurer based on estoppel. Indeed, in the Yuen case, the insured was specifically informed prior to trial that no coverage existed under his policy; the insured's only detrimental reliance in that case was on the insurer's promise to defend.

3. The result of this court's reversal of the judgment below creates an anomaly when considered in connection with Yuen v. London Guar. & Acc. Co., 40 Haw. 213 (1953), a decision of the Supreme Court of Hawaii, controlling under

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

This court holds that defendant's insureds, had they paid plaintiff Chapman's judgment against them, could not recover that amount against defendant First Insurance Co. notwithstanding a breach by defendant of its promise to defend. Yet had defendant fulfilled its promise to defend, then under Yuen v. London Guar. & Acc. Co., the insureds - and this judgment creditor - would have been entitled to recover the full amount of judgment up to the limits of the policy. Thus, defendant, by the breach of its promise to defend, escapes the very liability which it would have incurred by keeping that promise.

4. This court, although it considered the trial court's finding that defendant made a promise of coverage to its insureds in bad faith and to protect its own self interest, apparently overlooked the following additional findings of fact by the trial court:

a. That the actions of the defendant toward its insureds constituted conscious culpability on the part of the defendant;

b. That defendant acted in bad faith violation of a Hawaii statute by seeking to protect the interest of other insureds to the detriment of Mrs. Brown and Mrs. Chase;

c. That the insureds were prejudiced in the loss of the opportunity to enter settlement negotiations prior to suit; and

d. That the insureds were prejudiced in that they lost the opportunity to promptly investigate plaintiff's claim, which loss was per se prejudicial according to the undisputed testimony of all expert insurance witnesses in this case, both for plaintiff and defendant.

This court did not overrule these findings of fact of the trial court, although they were apparently not viewed in a light most favorable to plaintiff. This court's conclusion that Mrs. Brown and Mrs. Chase did not detrimentally rely on defendant's representation of coverage in an indemnity for loss sense apparently overlooked the trial court's findings c and d above, which show insureds' reliance on the promise of coverage. These findings state that the insureds were prejudiced in the loss of opportunity both to settle the case and to investigate the facts before suit was filed. Had defendant, instead of promising as it did both to cover and to defend, initially denied coverage but promised to defend, it is reasonable to expect that the insureds themselves would have taken steps at least to enter settlement negotiations.

5. There existed a division of opinion among judges of this court on plaintiff's cross-appeal. Because of this division of opinion on the scope of coverage provided in this products liability policy, and the importance of this question both to businessmen and the insurance industry, it is suggested that this court en banc consider the serious questions raised by Merrill, J. in his dissenting opinion on the cross-appeal, and the reformation issue raised on plaintiff's own appeal.

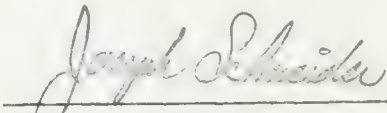
6. This court has not questioned the trial court's findings of fact. As a result of this case, therefore, an insurance company may with conscious and gross culpability, in bad faith, and in violation of state statute breach its obligations to its insureds by a misrepresentation of coverage, for the admitted purpose of fulfilling its own self-interest, and thereafter walk away with impunity even though such machinations work to the admitted prejudice of the insureds.

In light of this result and its obvious serious implications with respect to fair dealings of an insurer with its insureds, it is respectfully suggested that full court en banc consider both the appeal and cross-appeal of this case.

For the reasons stated above, petitioner requests that a rehearing be granted and that on such rehearing the judgment of this court be reversed and the judgment of the United States District Court for the District of Hawaii be affirmed.

DATED: Honolulu, Hawaii, December 17, 1965.

Respectfully submitted,



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and Cross-Appellant

CERTIFICATE

CAROL LEE CHAPMAN, plaintiff-appellee and cross-appellant herein, by her attorney hereby certifies that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well-founded in law and proper to be filed herein.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MARSHALL, CHARLES DEL MONICO,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

APPELLANT JOHN MARSHALL'S
PETITION FOR REHEARING

Appeal From The United States District
Court For The Southern District of
California, Central Division

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FILED

FEB 25 1963

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MARSHALL, CHARLES DEL MONICO,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MARSHALL, CHARLES DEL MONICO,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT JOHN MARSHALL'S
PETITION FOR REHEARING

Appellant John Marshall respectfully petitions the Court for a rehearing as to its judgment of January 27, 1966 on the following grounds:

I

THIS COURT DID NOT RULE UPON APPELLANT'S POINT THAT HE WAS ENTITLED TO AND DID NOT GET THE UNANIMITY INSTRUCTION.

In his statement of the Questions Involved, appellant said (pp. 5-6, Op. Br.):

"When the statute under which a defendant is tried sets forth separate offenses or different ways by which the statute can be violated, and the indictment charges in the language of the statute, is not the defendant entitled to an

instruction that the jury must be unanimous as to which offense or offenses they might find had been committed, or as to which particular act or acts they might find had been committed by the defendant. "

In his Specification of Errors, Numbers 4(k) and (l) (Op. Br. pp. 9-12), appellant complained of as error, the refusal of the Trial Court to give his requested instructions numbers 48 and 50, on the ground that (pp. 10-11, Op. Br.), "the jury must be instructed that they must be unanimous as to precisely what it is the defendant did, before there can be a valid verdict; that if some of the jury felt defendant did one thing proscribed by the statute, while others felt he did something else, also proscribed by the statute this would not be the unanimous verdict which is necessary before a jury can convict; that since the gist of the offense is travel with a specific intent, the jury must be unanimous as to just what that intent was and it must be so instructed. "

Appellant argued this under his Point II in his Opening Brief (pp. 28-37). Appellee responded thereto under its Point V, C. 2 in its brief (pp. 152-161) and appellant replied under his Point XII in his Reply Brief (pp. 23-25).

This Court in its opinion did not allude to the point nor dispose of it. Appellant respectfully submits that he is entitled to this Court's consideration of the matter.

COUNT THREE OF THE INDICTMENT FAILED
TO CHARGE AN OFFENSE UNDER THE STATUTE.

This Court apparently sought to answer appellant's contention by saying (Sl. Op. 6), "Count III, applying to acts in Nevada alone, would necessarily require a violation of the Nevada statutes (Title 16, Nevada Revised Statutes, §205.315 or 205.325)." (footnotes omitted)

Appellant submits that the Court's conclusion does not "necessarily" follow. The statute under which appellant was indicted (18 U. S. C. 1952) requires that the "unlawful activity", both as to the travel in interstate commerce with intent and the "thereafter" acts, be in violation of the State in which committed "or of the United States". There is nothing in Count III of the indictment which warrants the conclusion that the Grand Jury had in mind the extortion laws of Nevada ^{1/} and not those "of the United States". For the Court to have inserted in the indictment, the words (Sl. Op. 6), "violation of the Nevada statutes", is simply for the Court to have amended the indictment.

Certainly, the principle of Ex Parte Bain, 121 U. S. 1, 30 L. ed. 849, 7 S. Ct. 781, is, as recognized by the Supreme Court in Stirone v. United States, 361 U. S. 212, 217, 4 L. ed. 2d 252, 256 80 S. Ct. 270, still valid. In Bain, the Court said (121 U. S. at 10): "If it lies within the province of a court to change the charging part

^{1/} Or even of California's or some other state's.

of an indictment to suit its own notion of what it ought to have been or what the grand jury would probably have made if their attention had been called to the suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer', may be frittered away until its value is almost destroyed."

Furthermore, with reference to this Court's statement (Sl. Op. 3) that Count III applies "to acts in Nevada alone" (emphasis added), there is nothing in the general allegations (CT 6, lines 10-15) as to the "thereafter" acts to be performed or attempted to be performed, nor in the specific acts alleged in the Count (CT 6, lines 16-18), from which even an inference could be drawn that those acts were committed or attempted to be committed in Nevada and not in California or some other state. Thus, appellant now stands convicted "upon a charge not made", and, therefore, in "sheer denial of due process". (De Jonge v. Oregon, 299 U.S. 353, 362.)

Moreover, Count III is not saved, as this Court apparently thought it could be (Sl. Op. 6), by the Court's reference to Count I which (ibid) "charged the extortion was illegal under the laws of Nevada and California". To so do flies directly in the teeth of this Court's holding in Walker v. United States, 176 F.2d 796, 798 (1949).

In addition, this Court's amendment violates due process. Thus, this Court said (Sl. Op. 6) that "Count III ... would necessarily require a violation of ... Title 16, Nevada Revised Statutes, §205.315 or 205.325)." (footnotes omitted; emphasis added). In

other words, Count III, according to this Court's interpretation thereof, alleges a violation of either §205 315 or §205.325. Such a disjunctive charge is not permissible. While it is true that the Grand Jury may charge in the conjunctive, it is equally true that not even the Grand Jury may charge in the disjunctive. (United States v. Clarke, 20 Wall [U.S.] 92, 22 L.ed. 320, 322.)

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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CERTIFICATE

I certify that the above Petition for Rehearing is, in my judgment, well founded and that it is not interposed for delay.

/s/ Fred Okrand
FRED OKRAND

No. 19,426

United States Court of Appeals
For the Ninth Circuit

MAX E. TURNER, et al.,

Appellants,

vs.

KINGS RIVER CONSERVATION DISTRICT, et al.,

Appellees.

APPELLEES' PETITION FOR REHEARING OR, IN THE
ALTERNATIVE, FOR MODIFICATION OR CLARIFICATION
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No. 19,426

**United States Court of Appeals
For the Ninth Circuit**

MAX E. TURNER, et al.,

Appellants,

vs.

KINGS RIVER CONSERVATION DISTRICT, et al.,

Appellees.

**APPELLEES' PETITION FOR REHEARING OR, IN THE
ALTERNATIVE, FOR MODIFICATION OR CLARIFICATION
OF THE COURT'S OPINION**

To the Honorable Oliver D. Hamlin, James R. Browning, and Ben. C. Duniway, Circuit Judges:

This petition is filed by the Kings River Water Association, the Kings River Conservation District, and the other undersigned Districts and Water Companies, and one individual, joined as defendant-appellees herein (referred to as "petitioners"). The Court's opinion may be construed to hold, as a matter of generally applicable law, that Section 8 of the Flood Control Act of 1944 is applicable to Pine Flat Dam. Any such construction is a matter of grave concern to petitioners, who most earnestly submit that Section 8 does not so apply. Their position will be fully presented in *United States v. Tulare Lake Canal Company* and *Tulare Lake Basin Water Storage District* (Intervenor), pending in the United States District Court for the Southern District of California, No. 2483-ND, Civil, in which case this very question of applicability of Section 8 and of Reclamation law is in issue.¹

A holding of general application that Section 8 and Reclamation law apply to Pine Flat Dam is both unnecessary and inappropriate (as well as, we believe, erroneous) in the present case, where it is *not* in issue, and such question should be left for decision in the above cited pending case, where it *is* one of the major issues between the United States Government and the Tulare Lake Canal Company, and where it will be decided after full opportunity for *both* sides to be heard. This Court's opinion should not be left subject

¹This is the litigation referred to in the Department of Justice brief, pp. 53-54.

to the construction that any such holding was intended here.

At page 10 of the print of the Court's opinion, the second paragraph begins:

“Section 8 of the Flood Control Act of 1944 authorizes the Secretary of Interior to operate and maintain structures such as Pine Flat Dam ‘under the provisions of the Federal Reclamation laws (Act of June 17, 1902, 32 Stat. 388 and Acts amendatory or supplementary thereto),’ thus making all of the provisions and limitations of the Reclamation law applicable to the irrigation features of the Pine Flat project.”

As just stated and as we show under point 2 below, the applicability of Section 8 was, in fact, not in controversy in the present case and the issue of its applicability involves highly controversial questions of great significance. What we urge is that the Court make clear beyond the possibility of misconstruction that it simply “assumes,” *arguendo*, for purposes of the instant case, the applicability of Section 8 and of Reclamation law.

In order to make our own position perfectly clear: We do not, of course, disagree with the Court's affirmation of dismissal. Nor, “assuming” the applicability of Section 8 of the Flood Control Act, do we disagree with the Court's conclusion that it remits appellants to the Court of Claims. We believe (1(b), below) that Section 10 of that Act likewise directs appellants to the Court of Claims for any remedy to which they may be entitled.

1. NO DECISION OF GENERAL APPLICATION AS TO SECTION 8, WHICH COULD SERVE AS A PRECEDENT WHERE THE QUESTION OF GOVERNMENTAL IMMUNITY IS NOT INVOLVED, IS NECESSARY IN THE PRESENT CASE.

(a) In dealing with the defense of governmental immunity, the Court concluded that it must decide whether the acts of appellee officials exceeded their statutory authority "in the respects alleged by appellants," noting the admonition of the Supreme Court that "*. . . it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies.*" (Op., p. 7, including fn. 6; emphasis, this Court's.)²

Appellants' first cause of action relied entirely, and its second cause of action partly, on the preamble and on Section 8 of the Flood Control Act of 1944, it being the theory of the complaint that Section 8 served to make Reclamation law applicable to the irrigation uses of Pine Flat Dam. (Op., pp. 2-5.) Whether appellants were right or wrong in invoking Section 8 and Reclamation law, it is a complete answer for the Court to demonstrate that, *assuming* Section 8 applied, defendant officers were not exceeding their statutory authority in the alleged acts of which appellants had standing to complain. The opinion stated in detail the basis for its conclusion that Section 8 could not entitle appellants to relief in this proceeding. (Op., pp. 10-14, 14-17.)

(b) Appellants' second cause of action relied, also, on Section 10 of the 1944 Act. (Op., p. 5.) Here, too,

²*Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 690 (1949).

whether the irrigation uses of the Pine Flat Dam are determined by Section 10 (Army Engineers) or Section 8 (Bureau of Reclamation), it is sufficient for the Court to show that, in either case, and under either section (read in context and giving full force to appellants' contention as to the effect of the preamble), appellants could not prevail. The Court's opinion demonstrated that under Section 10 defendant officials were acting within their statutory authority. (Op., pp. 10-11, 14-17.) As the Court correctly concluded, with supporting reasons, referring to the Reports of both the Corps of Engineers and the Bureau of Reclamation, "we find no convincing evidence that Congress intended to prohibit absolutely any interference by appellee officials with downstream riparian rights" incident to the proposed operation. (Op., p. 15.) So far as Section 10 is concerned, the significant reference here is to the Report of the Corps of Engineers, which Congress expressly approved, with one exception, in authorizing the Pine Flat project.³

In résumé, a decision as to whether Reclamation law is or is not applicable to the Pine Flat project is unnecessary to the decision in this case because:

³The exception related to the "conditions of local cooperation," which the Court dealt with in its opinion (p. 21). Under the relevant provisions of Section 10, as set forth in the Court's footnote 24, page 21, it was the Corps of Engineers (not the Bureau of Reclamation, whose Report Congress did not accept) that Congress there authorized to build and operate the Pine Flat Dam and to make arrangement for payment "either in lump sum or annual installments, for conservation storage when used." And it is the Corps of Engineers in fact who built the dam and today operate it. It is about their operation of the dam that appellants complain. See e.g., Appellants' Opening Brief, p. 27; Reply Brief, p. 35.

(i) If Reclamation law does apply, it applies in its entirety so that appellants' remedy is an action for damages in the Court of Claims. (Op., pp. 10-14, 14-17.)

(ii) If Reclamation law does not apply, the acts of which appellants complain are most certainly not prohibited, for the appellee officers possess ample authority to operate the project under the provisions of the Flood Control Act of 1944. (Op., pp. 10-11, 14-17.)⁴

2. WHILE THE COURT PROPERLY ASSUMED THE APPLICABILITY OF SECTION 8 FOR PURPOSES OF TESTING THE COMPLAINT ON THE QUESTION OF GOVERNMENTAL IMMUNITY, NO DECISION OF GENERAL APPLICATION AS TO SECTION 8 WOULD BE APPROPRIATE IN THIS PROCEEDING.

(a) A definitive holding as to Section 8 should be made only after this Court has heard *both* sides of the argument, which was not true here. Appellants asserted and relied on the alleged applicability of Section 8 to the Pine Flat project, and the Department

⁴The Corps of Engineers has broad authority, similar to that of the Bureau of Reclamation, to acquire the interests in property necessary for their undertakings, and when rights are taken pursuant to authority, compensation is provided by suit in the Court of Claims (Op., p. 17), *Youngstown Co. v. Sawyer*, 343 U.S. 579, 632, fn. 2 (1952, Concurring Opinion of Douglas J.) and cases there cited, including *United States v. Causby*, 328 U.S. 256 (1946).

See also *United States v. Kansas City Insurance Co.*, 339 U.S. 799 (1950) and *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961), the latter case involving the operation of a dam and reservoir on the Roanoke River which was authorized by Section 10 of the Flood Control Act of 1944, 58 Stat. 887, 894.

of Justice, in behalf of appellee officials, joined in this assertion. The remaining appellees, including all of the petitioners, considered it unnecessary even to refer to Section 8 and, to the extent that the statutory and constitutional authority of appellee officials was considered, sustained their actions under Section 10 of the 1944 Act.⁵ Accordingly, from the nature of the case to this point, the Court has heard only one side of the Section 8 argument.

(b) On the other hand, the application of Section 8 to Pine Flat Dam is squarely in issue between plaintiff and defendant and intervenor in the *Tulare Lake Canal Company* case, above cited. For present purposes, Justice's description of that litigation, and its immense importance and wide consequences (Justice Dept. br., pp. 50-54, also p. 5, fn. 1), may be accepted as adequate, except that constitutional questions not heretofore decided are also presented. We particularly invite the Court's attention to the Government's correct statement:

"The answer which the Canal Company has filed presents for judicial determination . . . also

⁵The Department of Justice did not, however, trust all its eggs to the Section 8 basket. On the contrary, it stated under "Statutes Involved" (Br., p. 2): "The appellee officers of the United States assert that the only statute involved is Section 10 of the Flood Control Act of 1944, 58 Stat. 887, 891, 901." The Justice brief referred to "the somewhat ambiguous language of Section 8" (p. 14), and to the fact that whether the excess land provisions of Reclamation law apply to the Pine Flat Dam "has long been in dispute" and was not "finally resolved"—that is, within the Executive Branch of the Government—until the Attorney General's opinion of 1958 (p. 51). At one point the brief argues (and we believe correctly) that the specific language of Section 10 of the 1944 Act must control "the more general language of Section 8" (p. 57). Also see the Department of Justice brief at pp. 12, 16-17, 18, 32-33, 64-65.

the issue whether the acreage-limitation provisions of federal reclamation law are applicable at all with respect to the project'' (Justice Dept. br., p. 54, fn. 7).

Plainly, that litigation—and not the present case—is the proper vehicle for the definitive Section 8 decision.⁶ The Court may take judicial notice of that litigation and the pleadings and papers therein. *Federal Home Loan Bank of San Francisco v. Hall*, 225 F.2d 349, 354-355 (Ninth Cir. 1955); *Fibreboard Paper Prod. Corp. v. East Bay U. of Mach.*, Loc. 1304, 344 F.2d 300, 302, fn. 2 (Ninth Cir. 1965). The attorneys for said Company and intervening District in the *Tulare Lake Canal Company* case, who have not previously participated on behalf of said Company and District in the present litigation, have assisted in the preparation of this petition and are now joined as attorneys of record.

(c) The present case was decided, and affirmed, on the complaint alone. (Op., p. 1.) In petitioners' view, there exist highly significant guides to the proper construction of Section 8 not yet called to the attention of this Court and some of which can be presented only in the form of evidence, of which the Court would not take judicial notice. Such evidence includes proof as to the contemporaneous understanding of Section 8 by the Bureau of Reclamation itself, and is presently the

⁶There is certainly room for argument that even if Section 8 applies to the Pine Flat Dam, the acreage limitation provisions of Reclamation law do not apply, either as a matter of statutory construction or constitutional authority. Petitioners' first position, however, is that as a matter of statutory meaning Section 8 has no application.

subject of various interrogatories addressed to the United States, which the District Court, overruling objections, has ordered the United States to answer by April 15, 1966. Clearly, the application of Section 8 should be decided only on a complete record.⁷

If this Court's decision is allowed to stand in its present form and is construed by the District Judge in the pending *Tulare Lake Canal Company* case as a direct holding that Reclamation law applies to the Pine Flat project, the District Judge in that case may well feel bound by such holding, to the extent that he will refuse to allow evidence or argument by the defendant Tulare Lake Canal Company and intervenor on the subject, thus foreclosing a full adversary hearing on this extremely important issue which the Government itself has agreed in its contracts with these petitioners should be judicially determined after

⁷Among the guides to the construction of Section 8 referred to in this paragraph are, we believe, the proceedings of Governor Warren's Water Conference of December, 1945, participated in by both the Corps of Engineers and the Bureau of Reclamation; correspondence between official representatives of the State of California and the Corps and Bureau; the repeated, unsuccessful efforts of the Bureau to have the Pine Flat Dam reauthorized as a reclamation project, over the objections of the State of California and the Kings River water users; the fact that the Bureau assumed authority to negotiate Kings River contracts not by virtue of the 1944 Act as such but on the basis of a Presidential executive order of May 2, 1946 (which order, however, confusingly left the negotiation of contracts on other California projects authorized by the 1944 Act in the hands of the Corps of Engineers); and the fact, referring to the provisions of Section 8, that no "such additional works", therein referred to, have ever been constructed at Pine Flat Dam, that no determination or recommendation, as therein provided, has ever been made, the Congress itself having made such determination, upon the recommendation of the Corps of Engineers, in Section 10 of the Act, and that no part of the Pine Flat Dam is or ever has been operated or maintained by the Secretary of the Interior or the Bureau of Reclamation.

a full hearing on the merits. On the other hand, even if the District Judge in that case does not construe the language of this Court's decision as holding as a matter of generally applicable law that Reclamation Law does apply to the Pine Flat project to the extent that he will reject evidence or argument on the issue, he might well feel sufficiently bound by this Court's unqualified language so as to render an adverse decision, even though he had before him substantial evidence that Reclamation Law does not apply and that the opinion of the Attorney General (41 Op. A. G. 377), which is itself in issue in the *Tulare Lake Canal Company* case, was incorrect.

CONCLUSION

(1) The Court should modify or clarify its opinion as to the application of Section 8 in the respect set forth in the third paragraph of this petition, page 2, above. Without attempting to presume as to the language which the Court might use, the substance of our point would be satisfied if the following were substituted for the first sentence of the second full paragraph at page 10 of the opinion:

"If we assume that Section 8 of the Flood Control Act of 1944 authorizes the Secretary of the Interior to operate and maintain structures such as Pine Flat Dam 'under the provisions of the Federal Reclamation laws (Act of June 17, 1902, 32 Stat. 388 and Acts amendatory or supplementary thereto),' and thus makes all of the provisions and limitations of the Reclamation law

applicable to the irrigation features of the Pine Flat project, the appellee officials would nevertheless be authorized to interfere with appellants' rights in the manner alleged in the complaint."

(2) As a less desirable alternative, since among other reasons the record in the present case is not complete, the Court should grant a rehearing and enable all parties to file additional briefs with respect to the application of Section 8 of the Flood Control Act of 1944 to Pine Flat Dam, followed by oral argument.

(3) If alternative (2) is followed, petitioners suggest, pursuant to the last paragraph of Rule 23 of the Rules of this Court, that further hearing be had before the Court *en banc*.

Dated, April 7, 1966.

Respectfully submitted,

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CERTIFICATION

I certify that the foregoing petition, in my judgment, is well founded, and that the same is not interposed for delay.

BRECKINRIDGE THOMAS,
*Of Counsel for Above Named
Appellees and Petitioners.*

No. 19,426

United States Court of Appeals
For the Ninth Circuit

MAX E. TURNER, et al.,

Appellants,

vs.

KINGS RIVER CONSERVATION DISTRICT, et al.,

Appellees.

APPELLANTS' REPLY TO APPELLEES' PETITION FOR
REHEARING OR, IN THE ALTERNATIVE, FOR MODIFI-
CATION OR CLARIFICATION OF THE COURT'S OPINION
AND TO AMICUS CURIAE BRIEFS IN SUPPORT THEREOF

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**United States Court of Appeals
For the Ninth Circuit**

MAX E. TURNER, et al.,

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VS.

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**APPELLANTS' REPLY TO APPELLEES' PETITION FOR
REHEARING OR, IN THE ALTERNATIVE, FOR MODIFI-
CATION OR CLARIFICATION OF THE COURT'S OPINION
AND TO AMICUS CURIAE BRIEFS IN SUPPORT THEREOF**

*To the Honorable Judges Oliver D. Hamlin, James
R. Browning and Ben. C. Duniway of the United
States Court of Appeals for the Ninth Circuit:*

PREFACE

Appellees' Petition and the supporting Amicus Curiae Briefs, suggest a rehearing on the grounds that the Opinion of the Court in this case, insofar as it holds that section 8 of the Flood Control Act of 1944 (38 Stat. 887) and the Reclamation Act (32 Stat. 388) incorporated therein by reference, apply to the Pine Flat Project, is unnecessary to the decision, is incorrect as a matter of law and is prejudicial to the parties in certain other pending litigation designed to test that very question.

The argument is that since, under the holding of the Court, the federal officials are not prohibited either by section 8 or the reclamation laws from interfering with appellants' water rights, the Court need not have decided whether they do apply, but could have and should have merely assumed the applicability. The suggestion is that the language of the decision be modified, accordingly, to conform to that appearing on pages 9 and 10 of the Petition, or if the question of applicability must be decided, that a full rehearing be granted in order that it be fully briefed and argued.

ARGUMENT

The appellants do not oppose a rehearing. The applicability of the reclamation laws to the Pine Flat Project certainly has not been adequately briefed, if at all. We do suggest, however, that the alternative request for "modification or clarification of the Court's Opinion", is not in order. It is not in order because whether the appellee officials are exceeding their statutory authority, and thus whether the complaint states a cause of action, turns upon applicability of the reclamation laws, for nowhere in the Opinion, except there, is the right of eminent domain found.

The rule is that the right to exercise the power of eminent domain must be conferred by statute, either in express words or by necessary implication.

Hoe v. United States, 31 S. Ct. 85, 218 U. S. 322, 335, 336, 54 L. ed. 1055.

The Court has found that the right is conferred by the reclamation laws. In the absence of an additional finding of authority to "take", a determination that the reclamation laws do apply, is not something which may merely be assumed but it is a matter which must be decided. If eminent domain has not been conferred, the appellee officials are exceeding their statutory powers and the judgment of dismissal must be reversed. If the judgment is to be affirmed, the Court must find that the power exists either in the reclamation laws, which it has, or in other laws, which it has not.

It seems clear that if the Court is to by-pass the question of whether the reclamation laws apply to the Pine Flat Project, much of the Opinion must be rewritten. The matter of whether the right of eminent domain is conferred by other statutes must be explored. Then, and only then, will the Court be in a position to ignore the reclamation laws or, as suggested in the Petition, to assume rather than decide their applicability.

This is not the time or place to explore the question of whether the power of eminent domain exists elsewhere. The Petition is completely silent on the subject. We merely state that we have not found it to exist elsewhere. We say this, notwithstanding that the Amicus Curiae Brief presented by the North Water Storage District and others suggests (p. 6) that it is to be found in 33 U.S.C. 701-C-1. That section, however, merely grants authority to acquire "lands necessary for dam and reservoir projects . . .

for flood control". We are not dealing here with flood waters (R. p. 463, ll. 25 and 26; p. 474, ll. 21 and 22; p. 479, ll. 5 and 6 and 24 and 25) but with waters used by appellants without waste, for irrigation, farming and domestic purposes (R. p. 453, l. 26 to p. 454, l. 2; p. 467, ll. 5 to 7). Even making the doubtful assumption that the word "lands" as used in the section includes water, the water here involved, being non-flood water, is not necessary to the operation of the facilities as a flood control project and the section clearly does not confer the power.

CONCLUSION

For the reasons stated, the Court should grant a rehearing but should deny the request for a mere modification.

Dated, Sacramento, California,
April 21, 1966.

Respectfully submitted,

WILMER W. MORSE,

Attorney for Appellants.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILMER W. MORSE

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

3319

— /
No. 19,431

QUEEN INSURANCE CO. OF AMERICA and GLENS
FALLS INSURANCE CO.,

Appellants,

vs.

UNITED STATES NATIONAL BANK OF SAN DIEGO,
etc.,

Appellees.

— /
No. 19,432

QUEEN INSURANCE CO. OF AMERICA and GLENS
FALLS INSURANCE CO.,

Appellants,

vs.

LONG BEACH NATIONAL BANK,

Appellee.

— /
No. 19,433

QUEEN INSURANCE CO. OF AMERICA and GLENS
FALLS INSURANCE CO.,

Appellants,

vs.

UNITED STATES NATIONAL BANK OF SAN DIEGO,
etc.,

Appellee.

—
PETITION FOR REHEARING.
—

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IN THE
United States Court of Appeals
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QUEEN INSURANCE CO. OF AMERICA and GLENS
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Appellee.

PETITION FOR REHEARING.

Pursuant to Rule 23, Ninth Circuit Rules, the appellants herein respectfully petition for a rehearing of the within causes. The grounds of this petition are:

1. The decision herein was based upon a ground—interpretation of the contracts in suit in the light of

business custom and usage—that has never been raised, briefed or argued and in respect of which appellants have had neither notice nor opportunity to be heard. The causes, therefore, have been decided by a procedure that was unfair to appellants and which (especially when taken in conjunction with the drastic restrictions of rule 23 upon the extent and scope of a petition for rehearing) has denied them due process of law contrary to the Fifth Amendment to the Constitution of the United States.

2. If in the circumstances of these causes evidence of custom and usage was cognizable, the Court's use and application of that evidence is erroneous for these reasons, all grounded in the law of California:

(a) As an aid to interpretation, evidence of custom and usage is no different from any other extrinsic evidence; and, therefore, a prerequisite to its admissibility and consideration for that purpose is an ambiguous or uncertain contract. It follows that even on the theory of decision adopted by this Court, it should have decided (which it did not squarely do) the strongly mooted issue of ambiguity to which the parties and the lower court devoted most of their proof, argument and consideration.

(b) The effect of the decision is to add to the contracts an agreement to insure a predecessor's fidelity losses. If the contracts, read apart from the alleged custom, do not provide such insurance, evidence of custom and usage, whatever may be its availability as an aid to interpretation, is ineffective to make such an agreement for the parties, or to vary or alter the agreement they did make. The Court, therefore, should have decided whether the contracts as written covered such losses, in order to determine, among other things, whether

evidence of custom and usage was properly cognizable.

(c) If the contracts as written exclude coverage of a predecessor's fidelity losses, the effect of the decision is not to determine what the parties meant by what they said, but rather to determine, contrary to the rule the Court professed to be following, that they meant something other than what they said.

(d) In order for extrinsic evidence to be effective to aid in the determination of what the parties meant by what they said there must be language in the contract capable of bearing the meaning sought to be given it. The Court seriously doubted there was any such language. Without such language there is no agreement. Agreement, as distinguished from meaning of ambiguous or obscure language, cannot be supplied by custom.

(e) The evidence relied upon did not establish the existence of the assumed custom as a fact, but only the opinions of a few persons as to the legal meaning and effect of policy forms. That is not sufficient to establish the existence in fact of a custom and usage of such general and universal acceptance in the business as to bind contracting parties.

(f) The evidence principally relied upon—Fitzgerald's opinions—was not evidence of a custom in existence at the time the contracts were entered into, but only of his opinion at a time long after they had been entered into and after these cases had been commenced.

(g) That part of the evidence thought by the Court to show the custom relied upon—*i.e.*, the evidence of the Association drafting activities—is only part of the evidence. The effect given it as

showing that predecessor losses were covered is negated by the drafting done after the contracts had been executed, so as to provide express coverage of such losses. This was a clear recognition that the pre-existing custom did not include them.

3. The evidence upon which the Court relies was inadmissible and objected to on substantial grounds other than the parol evidence rule—*e.g.*, hearsay, lack of foundation to show authority, invasion of the court's province to determine questions of law. Whatever the purpose for which it is used, evidence to which an appropriate objection has been made may be considered only if it is competent evidence. The Court should have determined the issue of competency that was squarely raised by appellants' objections below and specifications of error here.

4. The decision as to custom and usage is inconsistent with decisions of the Supreme Court of the United States and of this Court (as well as with the California decisions) to the effect that proof of a custom or usage inconsistent with a contract and which contradicts it cannot be received in evidence to affect it.

5. The statutory rules of interpretation in California, have been the subject of nearly a century of judicial exposition. They have received, as a consequence, a gloss that is not always the same as the literal meaning of the statutory language. Generally, and in respect of the rules with which this Court seems to have been most impressed, resort to "surrounding circumstances," "practical construction," "custom and usage" and the like may only be had to explain ambiguous, uncertain or obscure language, not to vary or contradict the meaning and legal effect of the contractual language, or to make for the parties an agreement they did not make.

6. The California decisions upon which the Court relied, are distinguishable, as they involve factual settings materially different from the instant cases, such as, *e.g.*: (a) evidence that a specific word or phrase by trade usage had acquired a meaning different from its ordinary meaning—no such word or phrase or evidence is identified at bar; (b) the contract was ambiguous in respect of the very provision that was being interpreted and upon which resolution of the controversy between the parties depended—no such provision is identified at bar; (c) existence of a trade usage, adhered to by a party to show the reasonableness of his conduct; or to show inferentially that certain conduct, conforming to the usage would have been taken.

Respectfully submitted,

HOWARD I. FRIEDMAN,

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Certificate.

I hereby certify that I am of counsel for the appellants herein; that in my judgment this petition is well founded; and that it is not interposed for delay.

HERMAN F. SELVIN

No. 19,438 ✓

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IN THE

**United States Court of Appeals
For the Ninth Circuit**

SOUTHERN PACIFIC COMPANY, a corporation,
et al.,

Appellants.

vs.

SWITCHMEN'S UNION OF NORTH AMERICA,
AFL-CIO, a voluntary association, et al.,

Appellees.

On Appeal from the United States District Court
for the Northern District of California,
Southern Division

**BRIEF ON REHEARING OF APPELLANT
BROTHERHOOD OF RAILROAD TRAINMEN**

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Southern Division**

**BRIEF ON REHEARING OF APPELLANT
BROTHERHOOD OF RAILROAD TRAINMEN**

INTRODUCTION

This brief on rehearing of the appellant Brotherhood of Railroad Trainmen is submitted pursuant to the Court's Order Granting Rehearing. Said Order suggests the possibility that the Court may have been in error in construing existing collective bargaining agreements as establishing craft lines along geographical lines. At the outset, the Brotherhood of

Railroad Trainmen wishes to state its belief that the Court correctly construed said agreements in this regard. The establishment of craft lines on a geographical basis has been accepted by all parties to this litigation from its beginning. The collective bargaining agreements of all of the Bargaining Agents party to this litigation contain provisions spelling out the geographical boundaries of the craft lines. It would be error for the Court in this instance to attempt another method of craft delineation in the light of existing practices and existing collective bargaining agreements.

I. CRAFT LINES BETWEEN ROADMEN AND YARDMEN ARE ESTABLISHED BY PRECISE GEOGRAPHICAL LIMITS.

The SUNA Agreement, Article 23, Section (b) provides in part:

“Location of yard limit boards as of October 1, 1934 establishes switching limits in all yards, . . .”

The SUNA Agreement, Article 31, Section (a) provides:

“Switchmen shall have the right to man all work train service operated exclusively within the recognized confines of yard limits.”

The Trainmen’s Agreement, Article 44, Section (e) also reads in part:

“Location of yard limit boards as of October 1, 1934 establishes switching limits in all yards, . . .”

The performance of yard service does not result in accumulation of rights for road service. Article 23, Section (a) of the SUNA Agreement reads in part:

“Yard employes will have no rights in train service and vice versa, but if temporarily employed, they will not lose their rights within sixty (60) days.”

The Trainmen's Agreement contains a provision to the same effect in Article 47, Section (a).

These provisions mean in effect that should a roadman desire to make application for yard work such roadman acquires no rights to perform such yard work by reason of prior performance of road work and that his application to perform such work is on the same basis as a newly hired employee; i.e., a person without any seniority. Further, the continued performance of yard work by a roadman, when road work is available, will result in the loss of the roadman's accumulated rights to road work. The roadman does begin to accumulate yard seniority as of the first day of compensated service in yard work. Organizational affiliation is not a factor in the acquisition of such work. An employee whose past employment has been in the area of road work and is a member of the Brotherhood of Railroad Trainmen cannot be assigned by the railroad to switching duties in a closed yard or secure such employment since the roadman has no rights to secure such employment. See SUNA's Agreement, Article 23, Section (a) and the Brotherhood of Railroad Trainmen's Agreement, Article 47, Section (a).

Conversely a member of SUNA could not secure performance of switching work at the City of Industry or be assigned to such duties for the reasons given.

A union cannot bargain with the carrier for the right of its members to perform work which is within the representational jurisdiction of another craft. The organizational representatives for the work at the City of Industry are, as stated in the Court's opinion, the road service representatives.

II. ARTICLE 10(b) OF THE SUNA-SOUTHERN PACIFIC AGREEMENT IS INAPPLICABLE TO THE PRESENT DISPUTE.

Article 10(b) does not allow Southern Pacific Company to extend the switching limits by designating the City of Industry as a closed yard because:

1. By its own terms such procedure is to be initiated only by the carrier.

2. Article 10(b) applies only to changing existing switching limits and not to the establishment of an entirely new closed yard.

3. Yard crews are not now and never have been employed at the City of Industry. Neither is that location within the limits of any closed yard; it is in fact located in road territory and has always been served by road crews.

4. Article 10(d) provides in explicit language: "This agreement shall in no way effect the changing of yard or switching limits at points where no yard crews are employed".

SUMMARY

The purported Section 6 notice of SUNA upon Southern Pacific Company constituted an attempt to raid the established jurisdiction of another union and does not give rise to a bargainable dispute. The opinion of the Court dated July 20, 1965 recognized this and should remain unchanged.

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J. J. Corcoran.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLIFTON HILDEBRAND.



No. 19438

United States
COURT OF APPEALS
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a corporation; et al.,

Appellants,

v.

SWITCHMEN'S UNION OF NORTH AMERICA,
AFL-CIO, a voluntary association; et al.,

Appellees.

*On Appeal from Summary Judgment of the United
States District Court for the Northern District
of California, Southern Division*

MEMORANDUM OF APPELLEES ON REHEARING

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MEMORANDUM OF APPELLEES ON REHEARING

In its order granting a rehearing this Court requested the parties to answer three questions for the purpose of furnishing the Court "enlightenment on the question of the degree to which existing collective bargaining agreements restrict the freedom of the railroad to assign personnel to yard work or road work and the freedom of employees, by themselves or through their union, to secure such work."

QUESTION 1

The first question posed by the Court is as follows:

“1. Could an employee whose past employment has been in the area of road work and who is a member of BRT be assigned by the railroad to switching duties in a closed yard or secure such employment? Conversely, could a member of SUNA secure employment in the performance of switching work at the City of Industry or be assigned to such duties by the railroad?”

The answer to the foregoing two questions is for all practical purposes “No,” but with exceptions which point up the type of relationship which holds both employees and railroad to observance of employment relationships along craft lines. In the first place, it should be pointed out that membership of an employee in either the BRT or SUNA has nothing whatsoever to do with whether an employee is qualified to be assigned to road or yard work. As the record here shows, prior to November 1951 the BRT represented yard service employees on the Southern Pacific (Tr. 40), at which time a minority of the yard service employees were members of SUNA. Since 1951 the SUNA has been the representative of yard service employees on Southern Pacific, but a minority of yard service employees continue to be members of BRT. Under the provisions of Section 2, Eleventh (c) of the Railway Labor Act (45 USC 152, Eleventh) membership in either BRT or SUNA satisfies the union shop provisions of either the SUNA or BRT union shop contracts.

The seniority arrangements of both BRT and SUNA, however, serve to bar the railroad from assigning yard service employees to road service or vice versa except in limited and unusual situations which we will describe hereinafter. The seniority arrangements of both BRT and SUNA with the Southern Pacific are traditional in form. Road service employees have seniority only for road service; yard service employees have seniority only for yard service. So if Southern Pacific desired to assign a road service employee to yard service or vice versa, it could do so only if no one holding seniority in the particular craft or class was available for the job and if the assignee entered as a new employee at the bottom of the seniority roster.

The exceptions to the foregoing are that in an emergency road service employees may be used for yard service and vice versa and, in instances where the extra board is exhausted in either road service or yard service, a crossing over to remedy the lack of men on the extra board is permitted. Except in these two unusual situations the railroad is confined by seniority agreements to using employees holding seniority as yardmen for assignments in yard service and to using employees holding seniority on roads for assignments in road service.

One other situation gives the appearance of an exception but on analysis it proves not to be an exception. If switching service in any yard becomes so reduced in amount as to use only one engine on a shift, and that for less than four hours per shift, the employer may use road employees to perform such switching. In effect this

involves abolition of the yard for such period as switching remains at or below the set figure and to merge the limited switching there performed into road service.

Except for the foregoing unusual situations the Southern Pacific cannot assign an employee whose past employment has been in the area of road work to switching duties where yardmen are employed and such an employee could not secure such employment unless he signed onto switching work as a new employee with his name at the bottom of the yard service seniority roster. Conversely, an employee with yard seniority could not presently secure employment in the performance of switching work at the City of Industry or be assigned to such duties by the railroad unless no employee with road seniority made a claim to the work and the yard service employee was willing to sign on for switching work at the City of Industry as a new employee with his name at the bottom of the road seniority roster.

QUESTION 2

The second question posed by the Court is as follows:

"2. If the answer to the foregoing is in the negative (or, if in the affirmative, only subject to loss of substantial rights), could the unions bargain for the right of their members to free employment in pursuit of their craft, whether within or without closed yards?"

It is the position of SUNA that it is entitled to bargain for the right of the employees whom it represents, that is all employees of Southern Pacific in the craft or

class of yardmen (foremen, helpers, switchtenders), to perform the functions of their craft wherever Southern Pacific has such work to be done. Again, we respectfully point out that unions cannot bargain for their members except when their members are within the craft or class for which the union is certified. SUNA is certified for all yard employees of Southern Pacific whether members of SUNA or not. BRT has members within this craft or class but cannot bargain for them because it is not the certified representative of this craft or class.

In the instant case SUNA invoked the procedures available to it under Section 6 of the Railway Labor Act for the purpose of preserving to the employees it represents yard work formerly done by them but which had been or was being transferred away from them. The complaint herein had attached as Exhibit "A" (R. 14-15) the Section 6 notice served by SUNA on the railroad on February 6, 1961, by which SUNA sought to secure employment for employees it represented, to secure to them the right "to all work in the nature of switching and allied service to be performed in the general area at a place and yard" known as "City of Industry, Future Yard Development." The complaint set forth the details with respect to the transfer of work performed by employees represented by SUNA from the railroad's switching yard in Los Angeles to City of Industry, where instead of being done by yard service employees the railroad assigned the switching work to road service crews whose rate of pay is lower than the yard rates of pay (R. 7-8). The National Mediation Board accepted and processed this as a proper Section 6 notice (R. 4-5, 8, 16-18). The court below likewise held this was a

proper Section 6 notice dealing with a subject about which it was proper for SUNA to bargain with Southern Pacific (R. 171, 173).

This Court in its initial decision of this case took the view that SUNA should have resorted to the National Mediation Board for a determination of its right to represent employees doing switching at Oakland, in the vicinity of Salem and at City of Industry. In so ruling this Court misconceived SUNA's position. SUNA wants employees it already represents to be allowed to perform the usual functions of their craft or class at City of Industry and the other locations involved. It is not seeking to have employees already represented by BRT change their representation. SUNA has been certified to represent all yard service employees of Southern Pacific. The work being performed at City of Industry and the other pertinent locations is in fact yard work. However, presumably because road switching rates of pay are lower than yard switching rates of pay (R. 7-8), the railroad has assigned road service employees to perform the switching work at Oakland, in the Salem vicinity, and at City of Industry and has not designated these areas as yards. SUNA has therefore sought by its Section 6 notices to have Southern Pacific recognize the yard status of the switching service actually being performed at these three locations.

The National Mediation Board regularly requires unions to utilize Section 6 procedures for delineating the dividing lines between road and yard work. Although the National Mediation Board treats yard service as a distinct craft or class, it depends upon bargaining to establish what is to be included in a yard area. The Na-

tional Mediation Board holds that all employees working a majority of their hours in a "yard" are "yardmen." The craft or class of yardmen includes employees working in "open" yards as well as "closed" yards. An attempt to limit the class or craft to "closed" yards has been rejected by the National Mediation Board as an improper effort to split a true craft or class. *Spokane, Portland & Seattle Railway Company*, 3 N.M.B. 159, 163-167 (Cases Nos. 3-2753, 2763, 2805). There the National Mediation Board stated:

"The ORC contention was primarily that the men doing yard work in the open yards are roadmen, because they hold seniority only as roadmen and there is no yard seniority as such for the men working in those yards.

"Yard service has been recognized for a great many years in the majority of rail carriers as a separate occupational classification and has on many occasions in the past been held by this Board to constitute a separate craft or class for representation purposes under the Railway Labor Act. The differences in the duties of road trainmen and men in yard service was fully described in the *Classification and Index of Steam Railroad Occupations*, issued by the United States Railroad Labor Board in 1921. These four occupational classifications and their descriptions are as follows:

'Yard Conductor or Yard Foreman:

"* * * positions in which the duties of incumbents are to supervise and assist the work of switchmen and helpers in yard switching and yard work train service, including supervision of the breaking up and making up of trains; and to perform related work (p. 257).

'Yard Brakeman or Yard Helper, Switch-tender:

* * * positions in which the duties of incumbents are to couple, uncouple and ride cars in connection with the breaking up and making up of trains; to handle switches; and to perform related work in connection with yard switching or switch tending service (p. 208).

'Road Freight Brakeman or Flagman:

* * * positions in which the duties of incumbents are to assist conductors in the operation and protection of freight trains; and to perform related work (p. 257).

'Road Freight Conductors:

* * * positions in which the duties of incumbents are to have charge of the operation of freight trains en route and at stations, between terminals; and to perform related work (p. 256).'

* * * * *

"It is clear to the Board that the commonly accepted distinction between road and yard service prevails on the Spokane, Portland & Seattle Railway and its operated subsidiaries; further, that the crews regularly assigned to yard switching work at the seven locations now referred to as 'open' yards are in fact and in name also yardmen;* * *"

That a Section 6 notice is the only avenue by which SUNA can preserve to its constituency the right to follow their switching work when it is transferred to points such as City of Industry, which are not within "closed yards,"

is made clear by the decision of the National Mediation Board in *Chicago & Northwestern Railway Co.—Yardmen and Switchtenders*, 1 N.M.B. 130, 135, 137 (Case No. R-218). There the BRT, being already the certified representative of all yard employees, sought to have the National Mediation Board exclude employees represented by the ORC from doing yard work. The National Mediation Board dismissed, suggesting bargaining with the carrier as the proper solution. The Board stated:

“We have here no dispute such as is described in Section 2, Ninth, of the Railway Labor Act.

“The dispute that does exist here is of a different character. It involves the right of employees of one craft or class to do the work that is commonly done by employees of another craft or class. By agreements whose validity is not questioned, road conductors are authorized to do yard work in the Chicago switching district. The Brotherhood of Railroad Trainmen desires to change this agreement, but the Order of Railway Conductors objects, and the carrier will not agree to make the change because the conductors refuse to relinquish their contractual right to work as yard foremen. Failing in its efforts to secure a modification of the agreements, the Brotherhood requests a finding by this Board that the men doing yard foremen’s work in the Chicago switching district do not belong in the craft or class of road conductors but in the craft or class of yardmen and switchtenders. * * *

“We are of the opinioin that the Railway Labor Act does not authorize the Board to decide a dispute of this character under the authority of Section 2, Ninth. It is our view that the dispute involves either

a change in the existing agreements or interpretation of the agreements,* * *

"If, on the other hand, the Brotherhood is correct in its contention that the road conductors working in the Chicago yards are in fact yardmen of the craft or class of yardmen and switchtenders, then it is already the legal representative of these men under the authority of Section 2, Fourth, of the Railway Labor Act; for it is admitted by all concerned that a majority of the yardmen and switchtenders have designated the Brotherhood as the authorized representative of the craft or class. But the determination of such a legal right as against the contractual right of the conductors is a matter for the courts and beyond the jurisdiction of this Board.* * *

* * * * *

"The right of these conductors to work as yard foremen in the Chicago yards was established by agreements of the Brotherhood with the Order of Railway Conductors and the railway company. * * * If any reclassification is to be made either of the roadmen or the road work, it is our view that it will have to be done by changing the existing agreements * * *."

In view of the foregoing decisions, it seems clear that SUNA has no remedy before the National Mediation Board. Instead, SUNA has only the recourse to the Section 6 procedures for changing of agreements, the course which SUNA has followed and which the court below held proper.

QUESTION 3

The third question which this Court put to the parties is as follows:

“What is the significance of paragraph (b) of Article 10 of the SUNA-SP agreement (pages 63-64 of the printed copy) in the light of the present dispute? Could SP, subject to the specified procedures, extend switching limits by designating City of Industry as a closed yard? If so, can SUNA bargain for such an extension?”

SUNA has no doubt that under paragraph (b) of Article 10 of the SUNA-SP agreement (pages 63-64 of the printed copy) the switching limits of the Los Angeles yard could be extended to include City of Industry within one and the same yard as includes Los Angeles. Similarly, the switching limits at Salem, Oregon yard and at Oakland, California yard would be extended to include the locations where local freight crews are now performing the switching service. While by its terms, paragraph (b) of Article 10, provides a procedure to be used where the carrier desires to extend switching limits, it does not bar SUNA from bargaining for such a change. The chief significance of paragraph (b) of Article 10 is that identical provisions appear in the contracts between Southern Pacific and BRT (page 103 of the printed copy) and ORC (page 95 of reprint of 1957, inserted in the bound copy). Since this provision provides for arbitration, Southern Pacific has a ready means of adjusting the whole dispute by arbitration and without any risk of a strike. See testi-

mony of Corcoran, General Chairman on the BRT, agreeing that this provision afforded the solution of arbitration for the dispute here involved (Tr. 49).

THE NMB CERTIFICATIONS

We believe the representation certifications are matters of which this Court can properly take judicial notice. Copies of the certification of SUNA by the National Mediation Board in 1958 and 1964 are printed as Appendices to the Petition of Appellees for Rehearing. No one has challenged the accuracy of these copies. If, however, this Court should decide it cannot properly notice these certifications, in that event we ask the Court to grant us leave to supplement the record by adding as exhibits certified copies of the certifications.

CONCLUSION

We respectfully urge this Court to consider our petition for rehearing and response, together with our main brief, along with this memorandum. We have not reprinted in this memorandum the arguments set forth in the three aforementioned documents. All four documents should be considered together to get a full statement of appellees' position.

We believe the court below properly held that the Section 6 notices served by SUNA presented a bargainable issue. SUNA as the representative of yard service employees owed them the duty to bargain with Southern

Pacific to preserve their jobs when yard work they were doing was transferred a few miles away and given to other employees. The judgment below should be affirmed.

Respectfully submitted,

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December 28, 1965

CERTIFICATE OF COUNSEL

I, Clifford D. O'Brien, one of the Attorneys for Appellees, hereby certify that in connection with the preparation of this Memorandum I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Memorandum is in full compliance with those rules.

CLIFFORD D. O'BRIEN

No. 19,438

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SOUTHERN PACIFIC COMPANY, a corporation, et al.,

Appellants,

vs.

WATCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, a voluntary association, et al.,

Appellees.

On Appeal from Summary Judgment of the United States
District Court for the Northern District of
California, Southern Division

**BRIEF ON REHEARING OF APPELLANT
ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN**

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No. 19,438

IN THE

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On Appeal from Summary Judgment of the United States
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California, Southern Division

**BRIEF ON REHEARING OF APPELLANT
ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN**

INTRODUCTION

This Brief on Rehearing is submitted by appellant Order of Railway Conductors and Brakemen pursuant to the Court's Order Granting Rehearing.

The Court's original Opinion of July 20, 1965 assumed that the existing bargaining agreements limit

SUNA's jurisdiction to approximately forty geographically defined "closed yards", and that jurisdiction over switching work outside these closed yards belongs to the BRT and the ORC&B. In its Order Granting Rehearing, the Court asked whether its original assumptions were correct. We will first show that the Court's assumptions were indeed correct. We will then set forth certain additional facts concerning which the Court requested further information, and will show that these facts are entirely consistent with the Court's original Opinion in this Appeal.

I. SUNA'S JURISDICTION IS LIMITED TO SWITCHING AND ALLIED WORK WITHIN SPECIFIED GEOGRAPHIC BOUNDARIES.

The geographic nature of the jurisdictional lines has never been disputed since the complaint in this case was filed almost four years ago. The complaint itself stated that its purpose was to extend the applicability of SUNA's agreement to an additional geographic area, namely, La Puente or "City of Industry" (Tr. p. 4, lines 13-17); no claim was made that switching work at City of Industry was already subject to SUNA's jurisdiction.

At the hearing on SUNA's Motion for a Preliminary Injunction on February 26, 1962, counsel for SUNA accurately stated:

"In the Los Angeles area at the present time the Switchmen's Union agreement applies within what are generally called yard limits, and those yard limits do not extend out as far as La Puente.

I think there is perhaps some eight or ten miles difference. So we will say our existing agreements do not cover this work.” (R. Vol. 2, p. 5.)

Following the hearing at which this statement was made, Judge Harris issued his Order, which stated in part:

“At a hearing before the court the parties . . . established the fact that the Switchmen’s Union has a collective bargaining agreement which gives its members exclusive jurisdiction over the Los Angeles yard whereas the Conductors and Brakemen have similar exclusive control over La Puente.” (R. p. 90.)

In its answer to the counterclaims that were subsequently filed, SUNA again conceded that its purpose was to expand its jurisdiction at the expense of ORC&B and BRT. SUNA stated its purpose to be “to extend the coverage of [its] agreement to . . . *geographical* areas where said agreement does not now apply and where such work is not now being performed by employees of the Defendant, SP, in the class or craft of switchmen and/or yardmen but is being performed and is to be performed by road employees in the classes or crafts of road conductors or road brakemen.” (R. pp. 151-152; italics supplied.)

Each of the applicable collective bargaining agreements refers to these geographic boundaries as being determined by the “location of yard limit boards as of October 1, 1934”. (Art. 23 (b) of SUNA’s agreement; Art. 44 (e) of the BRT agreement; Art. 48 (c) of the ORC&B agreement.)

The ORC&B has no objection to the Court taking judicial notice of the applicable representation certifications, the proceedings of record leading up to those certifications, and stipulations herein related thereto. The formal certifications of SUNA's jurisdiction are set forth in Exhibits A and B of SUNA's Petition For Rehearing. These certifications define SUNA's jurisdiction as covering all "yardmen"; but this term must be read in light of the fact that the employees eligible to vote in the elections were only those performing switching work in the forty closed yards and did not include the road employees performing switching work at City of Industry or other areas in road territory. This fact is conceded by SUNA on page 3 of its "Response of Appellees to Replies of Appellants to Petition of Appellees for Rehearing", where it states, "The election proceeding . . . was confined . . . to balloting of employees . . . who were employer *within established yard limits.*" (Italics supplied.) Thus, "Yardmen" as used in the formal certifications, simply means men doing switching and allied work in the established closed yards.

II. THE ADDITIONAL FACTS REQUESTED BY THE COURT IN ITS ORDER GRANTING REHEARING ARE CONSISTENT WITH THE COURT'S ORIGINAL OPINION IN THIS CASE.

The following facts are set forth in response to questions raised by the Court in its Order Granting Rehearing. These facts establish that the Court's orig-

inal Opinion in this matter was accurate in its understanding of both the facts and the applicable law.

1. Employees can move from road work to work in closed yards, and vice versa, only as newly hired employees; they carry no seniority or other rights with them except in certain limited circumstances. The general rule is set forth in Article 23 (a) of the SUNA agreement and Article 47 (a) of the BRT agreement, namely, that yard employees have no rights in train service and vice versa. Furloughed employees do have certain rights to move from one area to another; but unless they return to their original work when such work is again available, they forfeit their original seniority and must begin accruing seniority anew under the bargaining agreement applicable to their new jurisdictional area.

2. The Unions cannot bargain for the right of their members to pursue or obtain work across existing jurisdictional craft lines. This is not to say that the Unions have no bargaining remedies if and when their members are faced with loss of work due to movement of industries across the geographic jurisdictional lines. The Court recognized some of the types of remedies available on pages 3-4 of its slip Opinion. However, when the desired remedy is to obtain jurisdiction over additional geographic areas, as is the case here, then the appropriate remedy is not unilateral bargaining but rather representation proceedings under § 152 Ninth, of the Railway Labor Act, as stated by the Court in its original Opinion.

3. Article 10 (b) of the SUNA agreement, and the equivalent Article 44 (e) of the BRT agreement and Article 48 (c) of the ORC&B agreement, are designed to give the carrier the right to seek changes in existing switching limits where yard crews are employed. The purpose of this provision is being detailed in the supplemental brief being filed concurrently by Southern Pacific and will not be repeated here. We merely point out at this time that Article 10 (b) is inapplicable to this case *by its very terms*:

(a) It can be initiated only by the carrier;

(b) It provides for changes in existing switching limits, not the establishment of entirely new closed yards many miles distant from existing closed yards;

(c) It applies only to changes in existing switching limits "where yard crews are employed"; and there have never been yard crews at City of Industry. Subparagraph (d) of Article 10 specifically provides that "This agreement shall in no way affect the changing of yard or switching limits at points where no yard crews are employed."

Thus, Southern Pacific could not make use of Article 10 (b) to turn City of Industry into a closed yard. Bargaining for even such changes in switching limits as are contemplated by Article 10 (b) can be initiated only by the carrier; no Union can require bargaining over such changes where the result would be to infringe upon the jurisdiction of other Unions.

SUMMARY

SUNA's jurisdiction is limited to the closed yards. If SUNA wishes to extend its jurisdiction to all switching work wherever performed, or if it merely wishes to extend its jurisdiction over switching work to additional geographic areas, it can do so only by appropriate representation proceedings in which the employees whose work it seeks to usurp would have full opportunity to participate. This is precisely what the Court stated in its original Opinion and we urge that that Opinion remain unchanged.

Dated, San Francisco, California,
December 22, 1965.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WARREN H. SALTZMAN

No. 19438

In the

United States Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation;
et al.,

Appellants,

vs.

SWITCHMEN'S UNION OF NORTH AMERICA,
AFL-CIO, a voluntary association; et al.,

Appellees.

Appeal from the United States District Court for the
Northern District of California, Southern Division

**Brief on Rehearing of Appellant
Southern Pacific Company**

FILED

DEC 23 1965

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Brief on Rehearing of Appellant Southern Pacific Company

INTRODUCTION

Pursuant to order of the Court granting rehearing upon the Petition of Switchmen's Union of North America, Appellant Southern Pacific Company submits this brief.

Before turning to a discussion of the Court's order and questions raised thereby, Southern Pacific wishes to make it clear that it believes the Court has accurately evaluated the contentions and authorities of the parties in reaching

its opinion of July 20, 1965. The Court correctly and fairly dealt with the issues and authorities raised by the parties, and its opinion is fully supported by the record.

In accordance with the Court's order that the rehearing will be upon the original briefs already on file as supplemented by this memorandum, Southern Pacific will not reiterate or discuss again any of the authorities or points already made in prior briefs. The points and authorities in prior briefs of Southern Pacific remain as cogent today as they were when written even though the Court may not have dealt with them in its opinion. Of particular weight is the doctrine of the *Howard* case in which the Supreme Court said:

“Bargaining agents who enjoy the advantage of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers.” *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 774 (1952).

I.

THE CRAFT LINE SEPARATING ROADMEN FROM YARDMEN IS ESTABLISHED BY A GEOGRAPHICAL SEPARATION. THIS IS AN UNDISPUTED FACT IN THE CASE.

The Court's order granting the petition for rehearing is predicated upon the possibility that it was in error in construing the existing collective bargaining agreements as establishing craft lines separating roadmen from yardmen along geographical lines. The Court was not in error. The nature of the switching and station work performed by these crafts and the skills needed to perform it are essentially the same for both crafts. Hence the only way to distinguish roadservice from yardservice is by the location of the work. This is evidenced by the following references:

(1) The counterclaim of each appellant contains the following section numbered V (TR 97, 106, 111):

“At all times material to this action Southern Pacific has performed switching and allied services for shippers and receivers of freight as provided in published tariffs and as required by the Interstate Commerce Act. When such shippers and receivers are located within established switching limits where switchmen are employed and yard service has been established (hereinafter referred to as established yards), the switching and allied service required by them is performed by switchmen, switch foremen (yard conductors) and employees of other classifications pursuant to the provisions of the collective bargaining agreement between Southern Pacific and its Switchmen and Switchtenders represented by SUNA effective September 1, 1956, (hereinafter called Switchmen’s Agreement). This same service within established yards has been performed by switchmen (yardmen) for many years pursuant to this collective bargaining agreement, which was originally negotiated between Southern Pacific and the Brotherhood of Railroad Trainmen, which organization was replaced by SUNA when the latter was certified by the National Mediation Board to represent the yard personnel (switchmen) in 1951. From and since the latter date SUNA has continued and maintained the same collective bargaining agreement with amendments from time to time.

When the aforementioned shippers and receivers of freight are located outside of established yards (hereinafter referred to as road territory) the switching and allied service required by them is performed by trainmen (brakemen) and conductors who operate throughout road territory as road crews. These trainmen and conductors perform the switching and allied services in road territory pursuant to the provisions of the collective bargaining agreements between Southern Pacific and the General Committee, Brotherhood of Railroad Trainmen, effective December 16, 1939, as revised October 5, 1959, as amended (hereinafter called Train-

men's Agreement), and between Southern Pacific and its conductors represented by the General Committee of Adjustment, Order of Railroad Conductors and Brakemen, effective July 16, 1955 (hereinafter called Conductors' Agreement). The latter two organizations were certified by the National Mediation Board to represent trainmen and conductors on Southern Pacific many years prior to 1951 and have continued such representation to the present time."

Appellee admits these paragraphs in the Third Defense of its answer (TR 151).

(2) SUNA in both its Petition for Rehearing (p. 2) and its Response to Replies of Appellants (p. 3) states that "the National Mediation Board follows the easily administered test of place of work" in drawing the line between road and yard employees.

(3) The agreements themselves state where the geographical line is located.

(a) The SUNA agreement (Ex. B to Affidavit of K. K. Schomp), Article 23, Section (b) reads in part as follows:

"Location of yard limit boards as of October 1, 1934 establishes switching limits in all yards . . . (p. 37)

(b) The BRT agreement (Ex. C to Affidavit of K. K. Schomp), Article 44, Section (e) reads exactly as the SUNA agreement above quoted (p. 102).

(c) The ORC&B agreement (Ex. D to Affidavit of K. K. Schomp), Article 48, Section (c) reads substantially as does the SUNA agreement above quoted (p. 94).

The foregoing provisions of each agreement (and there are similar provisions in the agreements covering engineers

and firemen) define the boundaries of the 40 closed yards referred to in the record and in the opinion of the Court.¹

(4) The Presidential Railroad Commission recognized the geographical boundaries between the crafts of road service and yard service when analyzing the subject. Its Report dated February 26, 1962, contains the following analysis on page 176.²

“Road Crews Performing Work in Yards. It is clear that the line of demarcation which has been drawn between road and yard work has given rise to a number of inefficient and wasteful practices, particularly with respect to road crews performing work in yards. There are a number of tasks or work functions which are common to the normal duties of employees whether engaged in road or in yard service. As a matter of fact, at points where yard service has never been maintained the work which a road crew may be required to perform without any payment (other than the wages for a normal road day) is generally indistinguishable from that which yard crews at other points perform as part of their regular assignments. Further, there are tasks which yard crews under the present rules perform at points beyond preexisting geographical switching limits which are also identical to those which the road crews perform. Employees in both services work with the same equipment and use essentially the same skills in the performance of their work assignments.”

It is apparent from the portion of the Report of the Presidential Railroad Commission set forth in Appendix B hereto that the clear line between road work and yard work developed historically. The line was established at a time when the same unions represented both roadmen and yard-

1. A list of the closed yards as set forth in Appendix A hereto.
 2. Report of the Presidential Railroad Commission, Part V, Chapter 12, “Combination of Road and Yard Service” is set forth in full in Appendix B hereto.

men, and hence it formerly was more harmonious and less rigid than it is today on Southern Pacific where rival unions represent the crafts—SUNA for the yardmen and BRT and ORC&B for the roadmen.³ The line became sharp and obligatory during and after the handling of railroad labor matters by the Government during World War I, by the War Labor Board, and subsequently by the National Railroad Adjustment Board and the National Mediation Board under the Railway Labor Act. The geographical division has been quite clear at all times since the establishment of the National Mediation Board to handle representation and jurisdictional disputes. It was fixed in writing on Southern Pacific the same year that the present Railway Labor Act was passed (1934).

But for the well understood geographical separation of road work from yard work, it would be a practical impossibility to have separate representation and separate crafts for road employees and yard employees. Without the lines between them the two crafts would blend and intermingle indistinguishably because the nature of their work, their skills, and their equipment are essentially the same.

II.

THE LINE BETWEEN THE ROAD AND YARD CRAFTS HAS BEEN JUDICIOUSLY MAINTAINED BY THE NATIONAL MEDIATION BOARD IN PERFORMING ITS FUNCTION OF SETTLING DISPUTES UNDER SECTION 2 NINTH OF THE RAILWAY LABOR ACT.

The historical development of the division between road work and yard work is briefly and generally covered by the

3. For the engine crafts (engineers and firemen) the same unions, The Brotherhood of Locomotive Engineers and The Brotherhood of Locomotive Firemen and Enginemen, represent both yard and road engineers and firemen respectively.

discussion of the Presidential Railroad Commission in Appendix B. The separation developed because the employees insisted that limits be placed on the amount of work a crew was to be asked to perform. Switching limits were frozen at their location in 1934. The separation was defined so that all employees understand where the line is. Yard employees know that if they are called upon to go beyond the switching limits, they can claim additional pay, and road employees know that if they are called upon to switch cars within switching limits where yard crews are employed, they can claim additional pay.

At first the men who performed the work generally had joint road and yard seniority. That is, both classes of service were performed by one craft and were represented by the same unions just as the engine service employees of today, and the men might be on road work for a while and then on yard work depending upon which type of work they preferred and could hold by their seniority. Subsequently as to the trainmen and yardmen, separate seniority rosters for the different crafts of employees doing yard service work and road work became more common. Essentially the men thus became restricted to one craft's work, and did not accrue seniority in the other craft. There was still some interplay, however, for the need for men in road work fluctuated. For example, if road work declined and vacancies existed for additional yard employees, roadmen could work temporarily in yard service and vice versa. There was an ebb and flow both ways.

Later, on Southern Pacific with the representation of yardmen being won by SUNA so that rival unions represented the two crafts, there became less interchange of employees and essentially today there is none. SUNA does

not want BRT men working in yards, and it does not want BRT men doing work outside of yards which SUNA could do inside of them. SUNA is trying to block out the BRT and at the same time increase the work assigned in yards and the number of established yards. The frequency and closeness of the results of the elections demonstrate the keenness of the rivalry on Southern Pacific.

The soundness of the Court's Opinion is strongly supported by consideration of the 1964 election of yardmen on Southern Pacific in which SUNA defeated BRT in the representation dispute. Southern Pacific has no objection to the Court giving consideration to the certifications of SUNA in 1958 and 1964 and to the National Mediation Board's procedures in connection therewith. (The point is raised in the Court's Order, p. 3.)

The 1964 election followed by several years the serving by SUNA of the purported Section 6 demands at issue herein. It also followed the commencement of this litigation. Nevertheless, at no time did SUNA contend or urge the Mediation Board to consider that City of Industry and the other locations in question were yards within the definition of the switchmen's craft. The only employees of Southern Pacific's Pacific Lines who voted in the election were those employed in the 40 closed yards previously referred to. (The yard employees of the Atlantic Lines also voted, but they have no relevancy to the issues of this case.) The unit of yard employees involved in the representation dispute was expanded in the 1964 election to combine both the Pacific and Atlantic Lines of Southern Pacific (because of the merger of two formerly separate corporations), but no question was raised about the appropriateness of only the employees of the 40 closed yards voting on Pacific Lines. These were the same Pacific Lines employees who had voted

in the 1958 and prior elections. In fact the matter of who was eligible to vote was agreed upon by representatives of SUNA and BRT.⁴

The employees at City of Industry and the other locations in question were not eligible to vote in the election of the representative for yard employees, and no one intended that they should have been eligible. If they were doing yardmen's work under yardmen's rates of pay, rules, and working conditions, they would have been considered yardmen and hence eligible to vote. No one contended that the locations in question were within the jurisdiction of the yardmen's craft or subject to the rates of pay, rules and working conditions of yardmen. SUNA did not contend or even suggest that the nature of the work at the locations was that of the craft of yardmen such that those locations should be within the unit voted. Had the issue been raised, the Mediation Board would have had to decide it in order to determine the scope of the unit and eligible voters in the election. The determination of the size of the unit is a prerequisite to holding the election. Perhaps the results of the election would have been different if the employees at the locations in question voted as part of the unit of the yardmen's craft. Nevertheless, without the sanction of either the employees affected or the Mediation Board SUNA now demands the right to have its agreement apply to the work and the employees performing it at City of Industry and the other locations. As will be further discussed below, yardmen and roadmen cannot intermingle in the performance of switch-

4. Attached hereto as Appendix C is a copy of the agreement dated September 23, 1964, of BRT and SUNA on eligible voters. To be an eligible voter an employee had to be on one of the seniority rosters of yard service employees. These are the rosters of the 40 closed yards.

ing work at the same location.⁵ They cannot share the work, for the jurisdiction of one excludes participation by the other. Hence, should SUNA achieve its demands, the road employees at City of Industry and elsewhere who now do the switching and allied work would be displaced by yard employees.

The Court's Opinion is supported by the citations of the Mediation Board cases on page 2 of SUNA's Petition for Rehearing. Contrary to what SUNA states in its Petition, the Mediation Board's test for determining whether men who perform both road and yard work from a common seniority roster shall be classified as roadmen or yardmen is not the "majority of hours worked" (SUNA Petition, p. 2), but rather the test is the nature of the rates of pay, rules, and working conditions applicable to the men and work in question. Regardless of the test to be applied in resolving the issue, the point here is that the issue is one for the Mediation Board and not the courts. As stated in the Court's Opinion upon the authority of *General Committee v. M.-K.-T. R.R.*, 320 U.S. 323 (1943), where the line is to be drawn between the two overlapping crafts is a question for the Mediation Board to answer, and it has its own standards for making such determinations. The issue of craft lines is basically an inter-union issue rather than an employer-union issue. It cannot be settled by agreement between the employer and one of the unions. As a practical matter, however, when the competing unions, themselves,

5. Through an agreement reached with all five operating organizations in 1964 at locations where yard crews are employed and the amount of switching work varies, if the work declines to a point where the last yard crew assigned is working less than 4 hours within 10 for 10 consecutive working days the last yard crew assignment may be discontinued and the remaining work performed by road crews. The rule is not applicable at City of Industry or the other locations involved herein for no yard crews are employed at these points. The rule does not relate to establishing closed yards.

are in agreement, there is no dispute for the Mediation Board to resolve, and the position of the carrier is relatively unimportant *Brotherhood of Railway Clerks v. Association of Non-Contract Employees*, 379 U.S. 814, 14 L. Ed. 2d 133 (1965). The parties hereto concur on where the line now is between road and yard work. SUNA does not claim that its agreement applies at City of Industry or the other locations in question. Those locations are admittedly in road territory and are manned by employees represented by BRT and ORC&B.⁶ The agreement reached by SUNA and BRT on who the eligible voters were for the 1964 election (Appendix C) recognized the point where the jurisdiction of BRT ended and SUNA began. The line was around the 40 yards already represented by SUNA.

In the Mediation Board's decision cited on page 2 of SUNA's Petition for Rehearing (Cases Nos. R-2753, R-2763, and R-2805),⁷ the competing unions were not in agreement on the size of the unit to be voted or on the eligibility of employees at certain locations to vote in the yard service

6. TR 151. SUNA's answer to counterclaims of Appellants contains the following:

"The three Section 6 notices referred to in the Counterclaims as having been served by the Plaintiffs, Switchmen's Union of North America, AFL-CIO, a voluntary association, et al, hereafter SUNA, on Defendant, Southern Pacific Company, all propose to amend the existing collectively bargained agreement between Plaintiff, SUNA, and Defendant, SP, relating to the wages, rules and working conditions of employees of Defendant, SP, in the craft or class of switchmen and/or yardmen so as to extend the coverage of said agreement to switching work and allied work of the same general nature performed and to be performed in geographical areas where said agreement does not now apply and where such work is not now being performed by employes of the Defendant, SP, in the class or craft of switchmen and/or yardmen but is being performed and is to be performed by road employees in the classes or crafts of road conductors or road brakemen."

7. Cases are set forth in full in Appendix D.

craft, so the Mediation Board settled the issue by determining in which craft the employees at the locations in dispute would fall. Although the locations were previously under the jurisdiction of the road service craft the Mediation Board determined that they should be under the jurisdiction of the yard service craft, and hence held the disputed employees eligible to vote for the representative of yardmen.

The cases, which were consolidated, involved on the one hand employees in designated closed yards subject to the BRT yardmen's agreement who were admittedly yardmen and eligible to vote. They involved on the other hand employees on the road seniority rosters in certain other yards where the work was admittedly yard service and which was covered by standard yard service rules and rates of pay found in the joint BRT-ORC&B agreement. Road crews were not permitted to switch in these yards. The only thing different about the yards in dispute was that the employees were governed by yard rules of a different agreement than that applicable to the closed yards and that the employees were taken from the seniority lists of road employees. The carrier considered the service at all of the yards in question to be yard service. The Mediation Board ruled that the employees performing yard service in the yards in question were eligible voters even if they were on the seniority lists of road employees. The Mediation Board distinguished certain cases cited to it in language equally applicable to distinguish the case at bar from the ones cited by SUNA as follows:

“The files in each of the above cases have been examined. It was noted that in each and every one of these cases, the list of eligible voters was established by agreement between the organizations without the necessity of the Board passing upon any such questions

as those raised by the ORC in the present cases. It was further noted in this examination of the above files that the crews referred to by the ORC are those performing switching at intermediate points and locations where no yard crews are regularly assigned. Such crews have always been considered to be in road service, some of them on certain roads being referred to as road switchers, roustabouts, or road dodgers, and in the main, those crews are paid local freight rates. In some few cases, by negotiated agreement, crews performing such service receive yard rates, but they are still considered to be in road service. This situation applies particularly to the crews working out of Will-bridge, on the Spokane, Portland & Seattle Railway."

The foregoing cases of the Mediation Board which SUNA cited in its Petition exemplify the authority of the Mediation Board to resolve issues of craft lines, issues which are essentially inter-union rather than company-union in nature. All employees of the craft are to be eligible to vote for the representative of the craft. The agreement of BRT and SUNA on eligible employees for the 1964 election of yard service employees did not include the employees at City of Industry and elsewhere. The Mediation Board accepted the agreement of the competing unions. No contention was made that the work at City of Industry, at Warm Springs, at Medford, at Gerlinger, or at Woodburn was yard work within the craft of yard service employees. SUNA is estopped from contending it now, and SUNA is in the wrong forum to urge the point anyway. As SUNA points out on page 2 of its Petition, crafts cannot be altered by agreement with the carrier. It follows that SUNA cannot expand its jurisdiction at the expense of BRT and ORC&B by a Section 6 notice seeking the agreement of Southern Pacific.

III.

THE FREEDOM OF EMPLOYMENT OF ROAD AND YARD SERVICE EMPLOYEES HAS DECREASED OVER THE YEARS. IT HAS DECREASED MOST RAPIDLY SINCE RIVAL UNIONS REPRESENTED THE CRAFTS.

The freedom of employees to secure work and the freedom of Southern Pacific to assign them to work largely depends upon the seniority provisions of the collective bargaining agreements. Only employees with seniority in the craft of yardmen can seek the work of the craft, and only employees with seniority in the craft can be assigned to the work of the craft.

Only furloughed employees of one craft can work in another craft on a temporary basis. When recalled to their principal craft, they must elect to go back to it and give up the seniority on the other or remain and relinquish seniority on their former craft. Generally, employees are not able to hold seniority in two crafts simultaneously if work is available to them in both. The exception to this rule is in crafts which are related promotionally. For example, a brakeman who has been promoted to a conductor retains his brakeman seniority and may alternate working as a brakeman and conductor depending on the need for his service.

The rights of employees to work in road and yard service are covered in the respective union agreements. Even after SUNA became representative of the yardmen, a furloughed brakeman could work in yard service if the work was available. When recalled to a brakeman's position he had to elect whether to return and relinquish whatever yard seniority he had acquired or remain in yard service and relinquish his road seniority. Likewise, a furloughed switchman could work in road service and make the same elec-

tion upon being recalled to yard service. (See SUNA agreement, Art. 23, Section (a)—Exhibit B to Mr. Schomp's Affidavit and BRT agreement, Art. 47, Section (a)—Exhibit C to Mr. Schomp's Affidavit.) As both the SUNA and BRT agreements specify in the above-cited Articles, but for this temporary transfer from one service to the other, yardmen will not have any rights in train service and trainmen will not have any rights in yard service.

The answer to question number one on page 2 of the Court's order is *no*, with the exception of the employee who has been furloughed as discussed above. Even this exception is in doubt today, for SUNA has submitted a case to the First Division of the National Railroad Adjustment Board under Section 3 of the Railway Labor Act, 45 U.S.C. 153, contending that as Article 23, Section (a), now reads (it was amended in 1959), Southern Pacific is in breach of the SUNA agreement if it even goes so far as to hire a furloughed brakeman (who continues to retain his seniority as brakeman) to work temporarily in yard service. SUNA's position is that rather than hire a Southern Pacific brakeman who is not working to fill a vacant yard position, Southern Pacific must hire a new employee. Southern Pacific is contesting this position of SUNA. It appears that because of the keen rivalry between SUNA and BRT, SUNA does not want any BRT men working, even temporarily, in the yards where SUNA represents the men.⁸ The SUNA's position as stated on page 8 of its submission reads in part as follows:

"It is the employes' position in this case that the carrier improperly permitted brakemen to work in Los Angeles Yard at times and dates of claim; that there

8. A copy of SUNA's submission to the First Division NRAB and of Southern Pacific's submission are in Appendix E. The list of brakemen used about which the dispute is raised has been omitted from each submission for brevity.

was no provision in the yard agreement to permit the use of such employes, *account such permissive rules had been removed from the yard agreement some five (5) months previous*; (see employes facts); therefore, the use of the brakemen as switchmen in yard service violated the provisions of the yard agreement heretofore reproduced. Accordingly, the claims should be sustained in line with binding yard settlements and Special Board Awards applicable to circumstances where brakemen are used in yard service."

The foregoing quotation demonstrates why road employees would be totally displaced at City of Industry if SUNA obtains jurisdiction over it and has its agreement apply as demanded.

Southern Pacific's position as stated on pages 7, 8 and 9 of its submission is as follows:

"The above-named individuals had been in service with carrier as brakemen (for less than two weeks in most instances and prior thereto with the Union Pacific Railroad), but because of insufficient work as brakemen they were cut off from such service and were then reemployed by carrier as switchmen at Los Angeles Yard. When carrier again needed additional brakemen, the above-named individuals had the option of continuing in carrier's service as switchmen, with seniority as such from date so established following their employment as switchmen, foregoing any rights they may have had under the agreement covering carrier's trainmen, represented by the Brotherhood of Railroad Trainmen; or, resigning as switchmen, thereby terminating their seniority and status as such under provisions of the current agreement and accepting service as brakemen. Each of the above named accepted the latter option as of March 16, 1960."

* * * * *

"No switchman at Los Angeles Yard was deprived of his seniority rights or exercise thereof as a result of

service performed by Switchmen Albrecht, Enderle, Gallagher, Hollis, Moore, Richcreek, Roberts and Spainhower on the various dates here involved. Those individuals were employed by carrier as switchmen on the respective dates shown in paragraph 3 of 'Carrier's Statement of Facts' and they established seniority as switchmen at Los Angeles as of their first day of compensated service as such, in the same manner as any other person newly employed by carrier for service as switchman at that point. They were used as switchmen on dates of this claim in accordance with their acquired seniority as switchmen and their resultant standing on the extra board for such service, or on regular assignments acquired through exercise of such seniority, in strict compliance with all applicable provisions of the current agreement and in the same manner as any other newly employed switchman. Their status with relation to other switchmen in Los Angeles Yard was no different than the status of any other newly employed switchman and their use for service at the various times and dates specified in this claim, being under the same conditions and agreement provisions applicable to any person newly employed by carrier as switchman, was thus without prejudice to the rights of any other switchman in Los Angeles Yard. In this connection the Board's attention is directed to claims involving a similar issue that were denied by this Board without aid of a referee in Awards 17653 and 18275."

In short, road employees do not have freedom to work in closed yard territory and yard employees do not have freedom to work in road territory. Their respective seniority and agreement provisions prohibit it except in cases of emergency. For the same reason that they cannot voluntarily go back and forth, Southern Pacific cannot mix their assignments. They remain permanently in one or the other of the crafts, and the only way to change is by giving up accrued

seniority in one craft and starting at the bottom of the seniority list of the other.

Question number two on page two of the Court's Order is partially answered above. The unions (BRT and SUNA) have bargained with Southern Pacific with regard to the men in the craft each represents leaving that craft and returning after working in the other craft. Because of the clarity of the craft line already discussed herein, there is no concept analogous to "pursuit of their craft, whether within or without closed yards" (p. 2 of Court's Order). Seniority is geographically defined within the craft. The limits of the craft are understood, and hence there is no mobility that would call for pursuit in and out of closed yards. As discussed in the principal briefs already filed by appellants, one craft cannot bargain about the work of another, and hence SUNA cannot bargain about yardmen working in road territory, and BRT and ORC&B cannot bargain about their men working in established yards (closed yards). The right to perform work does not flow over or across the geographical craft lines. The nature of the work is essentially the same on both sides of the line. It is done by the craft of employees on the side of the line where the work is located.

The location of Southern Pacific's customers is determined by those customers. The rail service to and for those customers is done where it must be done to give them the most efficient and economical transportation service as common sense would dictate and as the National Transportation Policy requires, 49 U.S.C., preceding § 1. A corporation having many plants requiring rail service will locate some in road and some in yard territory according to its own best interests. If rail crews and crafts obtained some sort of proscriptive right to each customer of Southern Pacific there could be no yard-road craft distinction. The result

would be chaos. Crews would clog the railroad trying to get to the switching points they "owned". The only practical way to separate the road and yard crafts is on a geographic basis, and this is the way it is done. As the Report of the Presidential Railroad Commission sympathetically indicates, the railroads have long been trying to reduce the inefficiency caused by the geographical division by making the line less inflexible.

From the railroad's standpoint, it would be best if there were no craft distinction between road and yard service. On the other hand, SUNA now has pending Section 6 notices (not involved in this case) which would further restrict Southern Pacific in the performance of its switching work. The demands ask for a rule restricting road crews in the performance of their normal work in yards and at the same time requiring all switching work—much of which for purposes of efficiency is performed in road territory—to be done only in the closed (established) yards. Thus, even today in spite of the recommendations of the Presidential Railroad Commission, SUNA is directing its efforts to reduce further the amount of freedom of employment that still exists between the road and yard crafts.

IV.

ARTICLE 10 OF THE SUNA-SOUTHERN PACIFIC AGREEMENT IS NOT APPLICABLE TO THIS CASE BECAUSE (a) THERE IS NO QUESTION OF FACILITATING INDUSTRIAL DEVELOPMENT, (b) THE CARRIER DOES NOT WANT TO CHANGE SWITCHING LIMITS, AND (c) NO YARD CREWS ARE EMPLOYED AT THE LOCATIONS IN QUESTION.

In response to question number three of the Court, Article 10 of SUNA's agreement and the corresponding articles of the other agreements (Article 44, section (e) of the BRT agreement and Article 48, section (c) of the ORC&B agreement) have no significance or relevance to this case.

To date, Southern Pacific has used these procedures to extend switching limits on two occasions. It extended the switching limits in one yard less than one-half mile and in another by slightly more than a mile. While in both cases no road switching work of any kind was brought within switching limits, certain territory formerly within the geographic area of road territory was brought within the limits of the particular closed yard involved. The extensions were merely to improve the handling of the work already being done in the yards, in other words, to make more room in the closed yards.

The reference of SUNA on page 3 of its Petition to the Presidential Railroad Commission's comment that collective bargaining in this area was "working well" refers not to establishing new closed yards and defining their boundaries as inferred by SUNA. Instead it refers to extending switching limits of existing closed yards under the terms of Article 10. The foregoing extensions on Southern Pacific neither altered existing road service or yard service nor did it establish any new service. The Commission said, "The machinery provided for the extension of switching limits has been working well" (Appendix B, p. 176).

Article 10 could not be used to establish a closed yard at City of Industry. This is in response to the third question of the Court. There are several reasons for the answer. First, the procedures of Article 10 are for the Southern Pacific's benefit. They may be invoked "where an individual carrier . . . considers it advisable to change" the existing switching limits (section (b)). Southern Pacific does not consider any change advisable in any situation referred to in this case. The purpose of the rule is to provide an avenue by which the carrier can enlarge a closed yard in order to achieve efficiency in the performance of industrial

and other types of switching service (section (a)). There is no question but that the switching provided by road crews at City of Industry and the other locations is both efficient and adequate. Hence Article 10 cannot be relevant on this basis.

The purpose of the procedure of Article 10 was to take care of the situation where the carrier needed more room for switching and where an industry located outside of switching limits was close enough to receive and needed to receive the service of yard crews. Perhaps it needed more frequent switching than road crews in that territory could provide. In such a case the carrier might want to be able to send yard crews beyond existing switching limits to do the work. This would infringe on the work of road crews in whose territory the industry was located. But the carrier could switch *new* industries with yard crews within four miles of the switching limits. The right to extend the limits to reach a nearby *old* industry thus avoided the obvious unfairness in service to the old industry. Southern Pacific has never attempted to invoke Article 10 to change switching limits in a manner that would infringe upon the work of road crews. Its two changes have been to improve the operations within the yard rather than to reach an industry with yard crews. Second, Article 10 is for changing switching limits at points where yard crews are employed. It is not for establishing new switching limits. The discussion of this point by the Presidential Railroad Commission speaks in terms of "extending switching limits". As a practical matter, Article 10 would be used for change in the manner of extension rather than contraction of the limits. But in no event would it be used to establish switching limits where crews would have to be employed. It speaks in

terms of changing "existing switching limits where yard crews are employed".

Third, the Article is not intended to be used at locations where no yard crews are employed (section (d)). No yard crews are employed at City of Industry or anywhere nearby. Section (b) is specifically limited to locations "where yard crews are employed". Article 10 does not provide a procedure for establishing a new closed yard. This is made clear in Section (d).

If SUNA argues that it merely intends to extend the Los Angeles switching limits to enclose City of Industry it would be an extension of more than 13 miles (the lowest figure in the record TR 49). If the Oakland switching limits are extended to Warm Springs it would be at least 21 miles (TR 156). The idea of such a huge extension is ridiculous because the extension merely to get at the switching work at City of Industry and Warm Springs would necessarily swallow up all intervening road territory which includes many other places where road crews switch and perform allied services. It would greatly encumber the efficiency of rail operations. The concept of extending existing switching limits as opposed to making the locations in question separate closed yards has never been injected or urged as an intention of SUNA's demands.

The prayer of SUNA's complaint initiated this litigation by seeking relief to restrain Southern Pacific from switching "at the place and yard located on Southern Pacific's Los Angeles Division named 'La Puente' and sometimes called 'City of Industry'" except by agreement with SUNA (TR 11). It was the establishment of yard switching service at the specific location and not all intervening mileage to the next closed yard that was put in issue by SUNA's demand. The complaint was supported by an

affidavit of Mr. Zies which further defined what SUNA meant by the place and yard called City of Industry. The affidavit refers in some detail to a map of the present and proposed facilities at City of Industry (TR 27). It was at City of Industry, not at other unidentified intervening locations, that SUNA was seeking to obtain the right to have the switching under its jurisdiction and agreement.

SUNA's demands would become even more outlandish if they were construed to extend existing limits because with a few more similar demands the entire railroad could become yard territory. The road service craft would be totally eliminated. While it may be desirable from the railroad's standpoint to have one instead of two crafts doing the work, SUNA cannot by serving Section 6 demands force the Southern Pacific to bargain about reducing and eventually eliminating the jurisdiction of the road service craft. The jurisdiction of the crafts and the respective unions can only be altered by the Mediation Board through elections and certifications. Southern Pacific cannot take it away by agreement with SUNA. If SUNA could compel bargaining on its demands, the road craft could by the same tactics endeavor to eliminate the craft of yardmen. The conflicting demands would cause a jurisdictional dispute of tremendous magnitude. (The likelihood of a strike to enforce the demands if held lawful needs no elaboration.) Where one craft begins and another ends is clearly within the province of the National Mediation Board as the Court's opinion has already stated. If any change is to be made in the jurisdiction of road and yard crafts already defined by the Mediation Board, such change must be made by the Board.

There are no yard crews at City of Industry or at the other locations in question so Article 10 (other than section (d)) has no significance or relevance to this case. Southern

Pacific, even if it so desired, cannot and could not use the procedures of Article 10 to make City of Industry a closed yard, and SUNA cannot bargain about transferring City of Industry from the agreements and jurisdiction of BRT and ORC&B to that of SUNA.

CONCLUSION

When the Court rendered its opinion the following facts were and they continue to be undisputed:

1. There are no issues of fact in the record.
2. The separation of the crafts having jurisdiction over yard work and road work is a geographical line.
3. The parties all understand where the line is and have defined it in their agreements.
4. City of Industry and the other locations in question are in road territory.
5. City of Industry and the other locations in question are not in any way covered by or subject to the jurisdiction of SUNA or its agreement with Southern Pacific.
6. Said locations are covered by and subject to the jurisdiction of BRT and ORC&B and their agreements with Southern Pacific.
7. The use of road crews at said locations to do switching and allied work under the BRT and ORC&B agreements does not in any way breach the agreement between SUNA and Southern Pacific.

The most complete treatment of the fact of the case pertinent to the Court's Order is found in the Affidavit of Mr. K. K. Schomp (TR 45).

In response to the Court's Order, Southern Pacific herein has made the following additional points:

1. Road and yard crews cannot intermingle or share the work of switching and allied service at a location where yard crews are not employed. For SUNA to take over City of Industry or elsewhere would automatically eliminate the road crews from switching at the location.
2. Article 10 is not relevant to this case (except section (d)) because at all locations in question no yard crews are employed. Article 10 cannot be used to establish new closed yards in what is now road territory.
3. The employees of each craft have practically no freedom to work or be assigned in the other craft except when furloughed and this exception is in dispute with SUNA. Neither craft can work in the territory of the other except to equalize time under Article 10, section (c) (and except as noted in footnote 5 above).

It is respectfully submitted that the Opinion of the Court should remain as written in disposition of this case.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM R. DENTON

(Appendices Follow)

Appendix A

Location

Southern Pacific (Pacific Lines) Yards

Western-Coast Division

Port Costa
Suisun
Oakland
San Francisco
San Jose
Watsonville Jet.

San Joaquin Division

Stockton
Traey
Fresno
Bakersfield
Mojave

Sacramento-Salt Lake Division

Gerber
Roseville
Sacramento
Sparks
Carlin

Los Angeles Division

Colton
Indio
Los Angeles
Santa Barbara
San Luis Obispo

Portland-Shasta Division

Brooklyn
Salem
Albany
Eugene
Roseburg
Coos Bay
Corvallis
Klamath Falls
Dunsmuir
Weed
Ashland

Tucson-Rio Grande Division

Yuma*
Phoenix
Tucson
Nogales
El Paso
Tucumcari
Douglas
Bisbee

*Under jurisdiction of Los Angeles Superintendent.

Appendix B

CHAPTER 12

Combination of Road and Yard Service

THE PROPOSALS

The Carriers propose the elimination of prohibitions or restrictions on the following activities:

(1) Use of passenger crews to perform switching or station work in connection with the cars of their own trains or to handle "light" engines of their own trains.

(2) Use of road crews in other than passenger service to perform any and all switching and station work and to handle light engines of their own trains.

(3) Use of yard crews to perform road work, or to perform work outside of switching limits.

(4) Right of management to designate or change switching limits or to establish or abolish yard or hostling service assignments.

The proposal contemplates the elimination of arbitraries, special or constructive allowances or penalty payments to any employee, or class or grade of employees, when road or yard crews perform any of the above described work.

The Carriers' proposal would establish a rule to provide that:

(1) Passenger crews would be required to perform any and all switching and station work in connection with cars of their own trains that might be required of them at their initial and final terminals and at all intermediate points.

(2) Road crews in other-than-passenger service would perform any and all switching and station work as might be required of them at their initial and final terminals and at all intermediate points, including the handling of "light" engines of their own trains, whether or not such switching and station work was in connection with cars of their own trains.

(3) When switching or station work is performed by road crews as provided in (1) and (2) above, such work would be [167] paid for as part of the road day or trip and additional compensation for such work would not be paid under road, yard or hostling rules and regulations. These provisions would apply whether or not yard crews, yard men, or hostlers are on duty when and where the work is performed.

(4) Yard crews would be required to perform both road and yard service and would also be required to perform service outside of established switching limits. Where such service is performed by a yard crew the work would be paid for as part of the yard day or tour of duty and additional compensation would not be paid for such work under either road or yard rules and regulations. These provisions would apply whether or not road crews are available when and where the work is performed.

(5) Yard crews, yard men, or hostlers would not be entitled to any penalty pay when road crews perform switching or station work or handle the light engines of their own trains; nor would road crews be entitled to any penalty pay when yard crews perform road work or perform service beyond switching limits as provided in (4) above.

(6) Management would have the exclusive right to designate and change switching limits, and to establish or abolish yard and hostling service and yard and hostling service assignments.

The Organizations propose that further combination of road and yard service be prohibited.

DISCUSSION

A. *Nature of the Issue*

In our discussion of the basis of pay proposals we indicated that there are entirely separate and distinct methods of compensating employees engaged in road service and of

compensating employees engaged in yard service. In addition to the distinction in method of compensation, distinction has evolved with respect to the type of work which may properly be performed by employees in the one class of service as opposed to employees engaged in the other. At the present time, mainly as a result of rulings by the Director General of Railroads, arbitration awards and interpretations of collective bargaining agreements by various railway labor tribunals, many work functions are held to be exclusively within the "jurisdiction" of the road service employees and others within the "jurisdiction" of the yard service employees. Thus, a line of demarcation has arisen between the two services which may not be crossed by the carriers in making daily work assignments without incurring liability for penalty payments. It is this line of demarcation which the Carriers seek to erase. [168]

Generally speaking, road service involves the movement of trains between two points or terminals. Yard service involves the movement or shunting about of cars to put a train together and make it ready for the road. The latter is commonly referred to as switching service.

Although yards vary greatly in size, purpose, and amount of activity, the general concept of a yard is an area consisting of a system of tracks within defined limits for the making up of trains, storage of cars, or other purposes. The term "switching limits" is generally used when referring to the boundaries within which yard crews may perform work. It is not to be confused with the term "yard limits". The two terms are not synonymous. Switching limits, having once been established by the carriers and the organizations, cannot be changed except by agreement. Yard limits, on the other hand, are designated by the carrier for operational purposes and generally they can be changed by unilateral action by the carrier.

The typical yard service employee, as we have pointed out earlier, reports for duty at a given point at a stated time and is released at the same point after the completion of his normal 8 hour tour of duty.

B. *The Historical Background*

In the very early days of railroading there was little separation of the two classes of service. In this respect the following remarks appearing in a study appended to the 1917 report of the Eight-Hour Commission are quite pertinent:

In earlier days before separation and division of labor were so fully recognized in railway practice as at present, a single crew made up the train at initial terminal, took it over the road and put it away at its destination. This practice still pertains to some extent in passenger service.

In the agreements negotiated by the Organizations and the Carriers in the late 1890's and the early 1900's, some contained provisions affecting road crews working in yards and yard crews working on line of road. Where those agreements contained clauses with respect to a combination of road and yard service in one assignment, they generally were addressed only to the amount of compensation which the road crew would receive. In rare instances provision was made for yard crews performing work beyond switching limits. An interesting example of this is to be found in a 1910 Mediation Agreement between certain Southeastern carriers and the Brotherhood of Railroad Trainmen which provided that yardmen required to perform service outside of switching limits would be paid miles or hours, whichever produced the greater compensation for the class of service performed with a minimum of 1 hour; this compensation

was to be paid [169] in addition to the regular yard pay without deduction for the time consumed in such service.

In a 1913 arbitration award disposing of a controversy between the Burlington Railroad and both the Conductors and Trainmen, the arbitrators refused to grant a request of the employees for a rule providing that road crews be given all work outside yard limits and that yard crews not be run outside yard limits except in cases where the main line was blocked and there were no trainmen available. That award did, however, grant a rule providing:

At points where yardmen are employed and are at the time in actual service, trainmen will not be required to handle trains or engines to or from yards and depots, nor to pick up or set out cars, nor to couple or uncouple air, signal or steam hose, nor to couple or uncouple safety chains, nor to do other work usually performed by car men where car inspectors or car repairers are employed.

During the period of Government control of the railroads in World War I the Director General issued Supplement No. 25 to General Order No. 27 under date of December 15, 1919, which provided as follows:

ARTICLE X.—ARBITRARIES AND SPECIAL ALLOWANCES

(a) Excepting payments under rules applying to work performed at initial and final terminals, and to final terminal delays, all arbitraries and special allowances applying to road service other than passenger, under rules, regulations, or practices, which conflict with the payment of single time, in miles or hours, from the time required to report for duty until released from duty at the end of the trip shall be eliminated.

On roads where no rules are in effect covering work performed at terminals, the practices in regard to the

character of work permissible or duties required at terminals are not to be extended.

(b) Where the special payments under the rules, regulations, or practices which are retained under section (a) have been allowed independently or separately from the trip, they will continue to be so allowed, but at the former rates.

ARTICLE XX.—ARBITRARIES AND SPECIAL ALLOWANCES

(a) Where it has been the practice or rule to pay a yard crew, or any member thereof, arbitraries or special allowances, or to allow another minimum day for extra or additional service performed during the course of or continuous after end of the regularly assigned hours, such practice or rule is hereby eliminated, except where such allowances are for individual service not properly within the scope of yard service, or as provided in section (b).

(b) Where regularly assigned to perform service within switching limits, yardmen shall not be used in road service when road crews are available, except in case of emergency. When yard crews are used in road service under conditions just referred to, they shall be paid miles or hours, whichever is the [170] greater, with a minimum of one hour, for the class of service performed, in addition to the regular yard pay and without any deduction therefrom for the time consumed in said service.

This directive although captioned "Arbitraries and Special Allowances" clearly affected the combination of road and yard service and it appears to be the first national rule on the matter. Despite the Carriers' assertion that the pronouncements of the Director General gave no credence to a real separation between the two services, it is implicit in the

language of this General Order that the Director General recognize some separation.

From 1918 to date, the road-yard issue has been dealt with on a number of occasions by various tribunals concerned with the interpretation of railroad collective bargaining agreements. Reference to a few of their awards will suffice to indicate how the current concepts with respect to the separation between the two services developed.

Railway Adjustment Board No. 1 in a 1918 award held that yard limit boards could not be moved by management if a question of compensation was involved. In another award that Board said that it did not countenance the extension of the practice of using road crews to do yard work or using crews to perform other service after the completion of their day's work, or the practice of requiring road crews to do excessive switching at terminals. In still another case the Board sustained a claim for a minimum day's pay in road service in addition to the day's pay for yard service when a yard crew was assigned to a road trip during the course of its tour of duty.

The Railroad Labor Board (1920-26) decided a case in which it held that a road brakeman was entitled to an additional day at yard rates when he performed some switching work upon arrival at his terminal. In another case it held that a yard crew was entitled to be paid a minimum day because a road crew made up its own train on a holiday when the yard crew assignment was annulled.

In 1938 the First Division of the National Railroad Adjustment Board issued an award which has been often cited in subsequent decisions of that Board. In its findings the Board set forth its view with respect to payments due when a road crew was required to perform yard service or a yard crew was required to perform road service. The following

language of this Board appearing in its findings in that case quite accurately reflects the current thinking of the Board:

As stated in Award No. 3110 this Division has held scores of times, in substance, that, in the absence of schedule or special agreement, road and yard work may not be combined in one assignment without incurring liability:

(a) to the men performing the work, for a minimum day in each capacity; and

(b) to men available but not used, entitled by seniority to the work and denied the right to perform it, the attendant pay of the work. [171]

The matter is one of much gravity because a failure to recognize or observe the principles involved may and has resulted in requiring payment of two extra days pay for a few minutes work, i.e., to the man who performs it, one day for his regular work and an extra minimum day for the additional work and a minimum day to the man denied the work.

The reasons are simple; as to the first man (the one who performed the work) the schedules contain separate articles governing road and yard work and as to each a basic day is provided of eight hours or less, 100 miles or less, etc. Consequently if either a road or yard man does fifteen minutes yard work and that is all there is of it for him to do, he is entitled to a minimum day for it although before or after doing it he may earn a day or more at road work. It is not correct to refer to it as a penalty; it is simply literal compliance with the express terms of the contract. As to the second man, i.e., the one denied the work, it is universally recognized that, if by virtue of his seniority rights—and they too are in part of the contract—he is entitled to perform certain work and that privilege is denied him and the work turned over to another, he should be compensated for his availability the same as though he had performed the work; and that likewise is not a penalty but

merely the carrying out of the contract. Some schedules contain specific provision as to what the compensation shall be less than a full day, as for example run-around rules allowing fifty miles (half a day) and the right to stand first out, but, when the schedule is silent as to what the compensation shall be, the only basis available is the minimum day rule. This Division has so decided in many cases.

Although there is a degree of consistency in connection with payments required when there is a crossing of the line of demarcation between road and yard work the awards of the First Division of the National Railroad Adjustment Board, as well as those of earlier tribunals, are not uniform with respect to where that line should be drawn. This has prompted some carriers to seek what have been characterized as "escape" agreements in an attempt to clarify the situation on their properties and to avoid potential liability for multiple payments for the performance of a given task. A typical agreement of this nature provides for the maintenance of a given number of yard assignments, describes conditions under which road crews may perform certain switching in yards with no additional compensation other than that required under terminal delay rules and provides (in addition to the road pay) for payments ranging from actual time spent in switching in the yard with a minimum of 1 hour to a minimum day (regardless of the amount of time spent in switching in the yard).

C. The Problem Areas

The problem areas in connection with the line of demarcation between road and yard service fall into three main categories:

- (1) Restrictions upon the work which road crews may perform in yards. [172]

(2) Discontinuance of assignments of yard crews where the amount of yard work has decreased to a minimal amount.

(3) Extending and contracting switching limits.

1. *Restrictions on Road Crews Performing Work in Yards.* The Carriers conducted a survey by questionnaire of 26 Class I line-haul carriers to determine current practices with respect to restrictions upon road crews performing work within switching limits. There were 13 different categories of work functions covered in the survey and the participating carriers were asked to signify whether there were any absolute or qualified restrictions upon road crews performing such tasks at initial terminals, intermediate points, and final terminals and to show whether the restrictions varied if (a) yard crews were employed and on duty, (b) yard crews were employed but not on duty, and (c) yard crews were not employed.

The 13 items of work involved were as follows:

Road crews accompanying or handling engine of own train in freight service.

Road crews accompanying or handling engine of own train in passenger service.

Road crews handling caboose of own train in freight service.

Road crews picking up and/or setting out cars of own train from or to more than one track in freight service.

Road crews picking up and/or setting out cars of own train from or to more than one track in passenger service.

Road crews picking up cars from and/or setting out cars to more than one yard of a terminal in freight service.

Road crews picking up cars from and/or setting out cars to more than one point in passenger service.

Road crews picking up cars from and/or setting off to other than main, running, departure, or receiving tracks in freight service.

Road crews picking up cars from and/or setting off to other than main or station tracks in passenger service.

Road crews cutting out bad order cars, no-bill cars, etc. in freight service.

Road crews cutting out bad order cars in passenger service.

Road crews performing switching not in connection with cars of own train in freight service.

Road crews performing switching not in connection with cars of own train in passenger service. [173]

It is clear from the survey that there is no uniformity among the various railroads in the extent to which road crews may be required to perform the various tasks set forth without penalty. Generally speaking, more restrictive conditions were found to affect work at terminals than at intermediate points. Further, conditions were most restrictive when yard crews were on duty, less restrictive where yard crews were employed but not on duty, and least restrictive where yard crews were not employed.

The effect of these restrictions upon the carriers' operations can readily be seen by citing a few examples. On many railroads, in yards where yard crews are employed, when a road train has been made up and it becomes necessary to switch out a defective car or a car without proper billing, the yard crew must be used to switch out such cars despite the fact that the road crew is on duty on the train and its engine coupled to it. This entails getting a yard engine and crew up to the train and setting aside the road engine while

the yard crew does the work involved. In some instances the yard engine couples on to the road engine and remains coupled while it goes about its work. On some properties, when a road train arrives at a terminal and it becomes necessary to change cabooses, the road crew may stand by while the yard crew performs the service. In other situations, the road crew is restricted to picking up only at one yard in a terminal consisting of two or more yards; it is, therefore, necessary for yard crews to bring "cuts" of cars to the departure yard from distant yards before departure of the road train even though the road train may pass the same yards on its way out of the terminal and by a simple switching move could pick up the cars. A similar situation exists in connection with the movement of an inbound freight train. If the road crew is restricted from setting off in more than one yard on its inbound trip it may pass yard tracks to which cars in its train are destined. It must move those cars to the terminal yard in which it is to dispose of its train and a yard crew is then required to handle such cars back to the point of destination.

2. *Discontinuance of Yard Assignments.* Because of restrictions upon road crews performing switching, many carriers, to avoid penalty payments, have retained yard crews where there is only a minimal amount of switching. The Carriers have cited a number of examples of yard crews paid for at least 8 hours on duty and performing from 2 hours to 4½ hours of work per day. In the preponderance of the examples cited in the Carrier study about 3 hours work per day was performed. In the Carriers' exhibit on this phase of the road-yard question, one of many similar examples given is as follows: at Jonesboro, Arkansas, the St. Louis and San Francisco Railroad Company [174] maintains a yard engine which performs about 2 hours work

per day and handles on the average about 20 cars per day. These generally are loaded cars which the yard crew delivers to consignees. The crew also relocates cars from the industry sites to the yard area. On the day of the Carrier's survey the crew went on duty at 8:30 a.m. and completed all its work by 10:30 a.m.

A joint agreement, dated December 12, 1947, between the carriers and the Conductors together with the Trainmen contained the following clause with respect to abolishment of yard service assignments:

Remanded to individual Managements and General Committees for negotiations whereby the last remaining yard assignment in a particular yard may be abolished where yard service requirements have decreased to a point that abolishment is justified.

The other three operating organizations did not reach accord with the carriers in the general movement which resulted in the agreement cited. That dispute was then referred to Emergency Board No. 57 which filed a report, dated May 27, 1948, in which the Board stated:

The problem involved in this proposal affects all crafts engaged in yard work and can best be solved through the application of processes of collective bargaining. Because of the absence of some of the parties concerned we are constrained to remand the matter, without more comment, to subsequent negotiations, first, on an industry-wide basis, and failing settlement there, to local negotiation.

According to Carrier testimony, the attempts of individual carriers to negotiate rules which effectively permit the abolishment of yard service have met with little success in the majority of instances.

3. *Switching Limits.* As appears from our discussion of the historical development of distinctions between road

and yard service, there were also restrictions on yard crews performing work on the road. Early in 1950 the carriers took steps to secure relief from these restrictions.

The Switchmen's Union of North America and the Western Carrier Conference Committee entered into an agreement, dated September 15, 1950, which in effect afforded the carriers involved the right to expand and contract switching limits to conform to the needs of the service. This agreement has been extended to cover all carriers on which the Switchmen's union represents the yardmen.

The Carriers represented by the Eastern, Western and Southeastern Carriers Conference Committees entered into a national agreement, dated May 25, 1951, with the Brotherhood of Railroad Trainmen. Under the agreement the carriers were afforded the right to use yard crews to serve new industries provided, the switch governing movement [175] from the main track to the track serving the industry was located at a point no more than 4 miles from the existing switching limits. The agreement also provided for negotiation, mediation, and final and binding arbitration with respect to proposed changes in switching limits. Agreements of the same nature were consummated with the other three organizations representing operating employees under date of May 23, 1952.

D. Analysis

The proposal as made by the Carriers involves broad and sweeping changes in the traditional concepts of the separability of road and yard service. The record does not support the need for such changes although there is ground for relief in some of the areas we have heretofore discussed.

Extension of Switching Limits. There is little need to discuss at length the question of extending switching limits.

The agreements with the five Organizations representing the operating employees in most respects appear to be working satisfactorily. The Carriers have attained a degree of flexibility in the use of yard crews to service new industries and in most instances road service employees affected are protected by provision for "equalization of time" spent by yard crews working beyond the switching limits. The machinery provided for the extension of switching limits has been working well; so well, as a matter of fact, that in the majority of instances in which the carriers have proposed switching limit extensions, agreements have been reached without resort to arbitration. Accordingly, there is no need to disturb the existing situation in this area.

Road Crews Performing Work in Yards. It is clear that the line of demarcation which has been drawn between road and yard work has given rise to a number of inefficient and wasteful practices, particularly with respect to road crews performing work in yards. There are a number of tasks or work functions which are common to the normal duties of employees whether engaged in road or in yard service. As a matter of fact, at points where yard service has never been maintained the work which a road crew may be required to perform without any payment (other than the wages for a normal road day) is generally indistinguishable from that which yard crews at other points perform as part of their regular assignments. Further, there are tasks which yard crews under the present rules perform at points beyond preexisting geographical switching limits which are also identical to those which the road crews perform. Employees in both services work with the same equipment and use essentially the same skills in the performance of their work assignments. [176]

In the light of the foregoing, it can hardly be said there are true craft lines between road and yard service although the jurisdictional lines which have been drawn are in many respects similar to those which are drawn between the work of true crafts as that term is commonly used in industrial relations parlance. The joint seniority system, under which an employee may hold rights to work in either road or yard service (but not both during the same tour of duty), is in effect on a number of railroads. Many thousands of operating employees hold these rights. This, too, is not a common characteristic of a craft-oriented labor force.

The Carriers' proposal for all practical purposes would completely obliterate the distinction between road and yard service. They propose a merging of all road and yard seniority lists to lessen the impact upon the employees who would be affected. This ignores other factors involved. For instance, indiscriminate combination of the two services in one tour of duty would lead to confusion in the application of bidding, assignment, and pay rules.

The Organizations resist the Carriers' proposal on the ground that the entire field should be left to local collective bargaining. There are, however, a number of factors which inhibit local collective bargaining on this subject. One of the paramount difficulties is the pattern of representation of train and engine service employees. Frequently, four or five organizations represent the operating employees. It is most unusual to find only one or two organizations representing them. It has already been seen that there has been little progress with respect to this problem on the national level when less than all of the organizations affected are involved in the same movement. Similar difficulties are encountered on the local level. As a practical matter, of course, it avails little to reach agreement with one group

of operating employees in this area when the other groups are unwilling to enter into similar agreements. Another factor which inhibits local collective bargaining in this area is the adoption of national or constitutional policies regarding the separation of road and yard service by some of the organizations.

We are convinced that a national rule governing the work which road crews may perform in yards is necessary. A rule should be established which affords the Carriers a more uniform and flexible operation consistent with the recognition that there are either separate seniority rights to road work and yard work or other rights dependent upon some sort of separation between the two services. For all practical purposes, this also requires a recognition of the principle that the work functions of the two services cannot be so completely compartmentalized under all circumstances as to prohibit employees [177] in one of the services from performing the same kind of work which employees in the other perform. In other words, it should be accepted that there are gray areas in the work required in yards where, under certain circumstances, either road crews or yard crews may be used to perform the same type of work without penalty.

The statement of the principle is somewhat easier than its implementation. The provisions of the rule should be based upon a rule of reason. It should be recognized that the prime function of the road crew is to get the train over the road and that of the yard crew is to classify and put the train together. Recognition should, however, be given to the fact that there is switching work which reason and necessity dictate should be performed by road crews as an incidental part of their day's work. Naturally, the amount and extent of such work should vary in accordance with whether or not

yard crews are employed at given locations. Greater freedom should be afforded the carriers to use road crews in switching where yard crews are employed but not on duty than where yard crews are on duty. There should be little or no restriction on the work which road crews may perform in yards where there are no yard crews employed.

Discontinuance of Yard Engine Assignments. Experience under the present national rule which expresses general principles and refers specific cases to local bargaining for resolution indicates the need for a new national rule prescribing conditions under which the carriers may discontinue the last remaining yard engine at a given location or on a given shift. We do not wish to imply that local collective bargaining on this subject has been totally ineffective. A number of local agreements on this subject have been negotiated. On these properties both parties commendably realized that where switching requirements are substantially reduced the carrier should have the freedom to abolish yard assignments and permit road crews to perform switching without additional payment either to the road crew performing the work or to any yard crew. In these agreements varying standards have been used to determine the extent to which the yard service requirements must diminish before the carrier may abolish the yard assignments—a preponderance use a standard of 4 hours averaged over a specified number of days. This appeals to us as a reasonable standard which should be applied in two ways: first, in determining when the carriers should have the right to discontinue yard engine service and in determining when the carriers should reestablish such service; second, the standard should be applied not only to the discontinuance of last yard engine assignments at a given yard but to the discontinuance of such assignments on any shift in yards where two or more shifts of yard engines are assigned. [178]

RECOMMENDATIONS

In the light of the foregoing, it is recommended that the parties negotiate a national rule which will incorporate the following:

1. *Provision should be made that, regardless of whether yard crews or hostlers are employed or are on duty, road crews may be required (a) to accompany or handle engines of their own trains from engine facilities or ready tracks to departure tracks or from arrival tracks to engine facilities or ready tracks, (b) to switch out defective or "no bill" cars from their own trains, (c) to handle cabooses of their own trains and to exchange cabooses from one train to another, provided the road crew handles either train into or out of the terminal, (d) to pick up or set out cars of their own trains as required from or to the minimum number of designated tracks which could hold the same, and (e) to pick up or set off cars which are part of the road train consist in more than one yard in consolidated terminals subject to reasonable restrictions concerning the maximum number of such yards.*

Such provision should further make it clear that where yard crews are not on duty road crews may be required to perform all of the work enumerated in a, b, c, d, and e above and in addition may be required to handle all switching in connection with their own trains. It should further be made clear that road crews operating in other than through freight or passenger service where yard crews are not on duty may be required to perform any switching or station work.

Provision should further be made that carriers will not arbitrarily transfer switching work to road crews which normally would be performed by yard crews, e.g., trains should not be made up so that switching normally performed at points where yard crews are on duty is required on line of road.

Provision should further be made that road crews are not entitled to any additional compensation other than that contemplated by the basic day, initial and final terminal delay, and conversion rules for the performance of the above services and that no yard crew or hostlers shall have any claim by reason of the road crew engaging in such work.

2. *Provision that, where more than one shift of yard assignments is worked and yard service requirements during the period of assignment of a given shift diminish to the extent that less than an average of 4 hours' yard work is required on that shift over a period of 10 consecutive working days, the last remain- [179] ing assignment on such shift may be abolished. Conversely, when yard service requirements increase to the extent that over a period of 10 consecutive working days an average of more than 4 hours of yard work must be performed within a period of time constituting a normal work shift, the yard assignment shall be reestablished.*

Where only one yard assignment remains in a given yard and yard service diminishes to the extent that less than an average of 4 hours' yard work remains to be performed on that assignment over a period of 10 consecutive working days that assignment may be abolished. Conversely, when yard service requirements increase to the extent that an average of 4 hours' yard work is required over a period of 10 consecutive working days within an 8-hour period, the assignment shall be reestablished.

Time spent by road crews in performing the services enumerated in the first paragraph of 1, above, shall not be counted in computing the 4-hour average. Provision should also be made that when yard service assignments are abolished under these conditions yard crews should be considered as "not on duty." [180]

Appendix C

NATIONAL MEDIATION BOARD

WASHINGTON

AGREEMENT TO COVER LIST OF ELIGIBLE
VOTERS

involving

Case No. R-3680, Representation Dispute Among
Yardmen (Foremen, Helpers, Switchtenders and

Car Retarder Operators)

Employees of

Southern Pacific Company (Atlantic & Pacific Lines)

The undersigned parties to representation dispute among Yardmen (Foremen, Helpers, Switchtenders and Car Retarder Operators) employees of the Southern Pacific Company (Atlantic & Pacific Lines) have inspected and hereby agree to the list of eligible voters to be used in conducting the election by the National Mediation Board in its Case File R-3680, as prepared by Mediator Luther G. Wyatt.

It is agreed that changes in the eligible list of voters as referred to herein will be made only to correct error. Only those employees shown on the eligible list will be permitted to vote, except that upon proof of error in list, such error will be corrected.

Signed at San Francisco, Calif., this 23rd day of September, 1964.

For Switchmen's Union of North America

By: /s/ JOHN R. BURGE, *General Chairman*By: /s/ GEO. CLARK, *Vice President*

For Brotherhood of Railroad Trainmen

By: /s/ R. B. ZIMMERMAN, *Gen. Ch.*

By:

Witnessed:

/s/ LUTHER G. WYATT

Mediator, National Mediation Board

Appendix D

NATIONAL MEDIATION BOARD

WASHINGTON

Case No. R-2753 Case No. R-2763 Case No. R-2805

June 11, 1954

In the matter of
REPRESENTATION OF EMPLOYEES
of the
SPOKANE, PORTLAND & SEATTLE RAILWAY
COMPANY, OREGON ELECTRIC RAILWAY,
OREGON TRUNK RAILWAY
(1) Road Conductors, (2) Road Brake-
men (3) Yardmen (Foremen, Help-
ers & Switchtenders)

FINDINGS UPON INVESTIGATION

On July 23, 1953, the Order of Railway Conductors (hereinafter referred to as the ORC), filed an application pursuant to Section 2, Ninth, of the Railway Labor Act, for the investigation of an alleged representation dispute among road brakemen, employed by the Spokane, Portland & Seattle Railway Company, the Oregon Electric Railway and the Oregon Trunk Railway (hereinafter referred to as the carrier. The three properties named are operated as a single unit). At that time these road brakemen were represented by the Brotherhood of Railroad Trainmen (hereinafter referred to as the BRT). This application was subsequently docketed as Case R-2753.

On August 26, 1953, the BRT filed an application for the investigation of an alleged representation dispute among road conductors employed by the above named carrier. At

that time the road conductors were represented by the ORC. This application was docketed as Case R-2763.

Also on August 26, 1953, the BRT filed an application for the investigation of an alleged representation dispute among yardmen employed by the carrier. At that time yardmen (yard foremen, helpers and switchtenders) in four yards of the carrier were covered by an agreement between the carrier and the BRT, these yards being located at Portland, Oregon; Vancouver, Washington; Astoria, Washington; and St. Helens, Oregon, and being known as "closed" yards.

At seven other locations, namely, Salem, Oregon; Albany, Oregon; Eugene, Oregon; Sweet Home, Oregon; Portland, Oregon; Electric Division Yard; Wishram, Washington and Bend, Oregon, these locations being known as "open" yards, the carrier employs men classed and paid as yardmen, but whose jobs are filled from the road conductors' and road brakemen's seniority lists. The representation of the men employed by the carrier on yard assignments at these locations is in dispute. This application was docketed as Case R-2762. [1]

Mediator Lawrence Farmer was assigned to investigate these three cases. His investigation commenced September 19, 1953, and was recessed September 25, 1953. During this investigation, the representatives of the ORC contended that all men assigned to the yard assignments in the seven so called "open" yards are not yardmen but are roadmen because no yardmen's seniority rosters, as such, exist in these "open" yards, and the yard foreman's vacancies are filled from either the road conductor's or road brakemen's seniority lists, while vacancies as yard helpers in these yards are filled from the road brakemen's seniority rosters.

Tentative eligible lists of road conductors, road brakemen and yardmen, system wide, were prepared by the carrier at the request of the mediator, showing men holding regular assignments, men on extra boards, and those working a preponderance of service for 30 days previous to the last payroll period, each in the three classes mentioned. After these lists had been prepared, the ORC representative contended that the men shown assigned as yard helpers in the "open" yards should be included in the road brakemen's list. Case R-2753, also that the men shown assigned as yard foremen in the "open" yards should be included on the road conductor's list, Case R-2763. The ORC admitted these men assigned in the "open" yards as yard foremen and yard helpers are being paid yard rates and are working under the yard rules carried in the joint agreement of April 1, 1925, between the carrier, the ORC and BRT; nevertheless, they contend these men are roadmen and not yardmen for the reason they hold no yard seniority as such.

The ORC representative advised the mediator on September 24, 1953 that they (ORC) did not desire to participate in an election among the yardmen of this carrier. On the strength of that statement, the BRT addressed a letter to the Mediator on September 24, 1953, withdrawing their application in Case R-2762, and that case was closed.

The BRT representative contended, in opposition to the position of the ORC, that eligible lists should be prepared on the basis of preponderance of service as road conductors, road brakemen and yardmen, as has been the Board's usual practice. Investigation was recessed on September 25, 1953 for Board consideration of the contentions of the two organizations. On October 6, 1953, the ORC was advised that the Board had considered their contentions and had found no reason to deviate from its practice of many years to establish eligible lists on the basis of preponderance of service

worked in the various crafts, and that a mediator would be assigned to complete the investigation of the two remaining open cases. On October 8, 1953, President Hughes of the ORC protested this ruling, and requested a formal public hearing on the issues raised by the ORC.

On January 8, 1954, the BRT requested the reinstatement of their application of August 26, 1953, for investigation of dispute on representation of yardmen, R-2762. This application was re-docketed as [2] this Board's Case R-2805 on January 11, 1954. On January 19, 1954, the Board ordered a public hearing to be held on the issues covered in Cases R-2753, R-2763 and R-2805. This hearing was held in Portland, Oregon, beginning at 10:00 a.m., January 26, 1954, and running through January 29, 1954, before Mediator Lawrence Farmer, as Hearing Officer, at which time all interested parties were permitted to present evidence in support of their contentions. At the invitation of the Board, a representative of the carrier was present for the purpose of supplying such factual data as might be requested.

ISSUES

The issues in Case R-2753, representation of road brakemen, R-2763, representation of road conductors, and R-2805, representation of yardmen, may be summarized as follows:

The ORC contends that approximately 54 brakemen assigned and working as yard helpers in the so called "open" yards, and all other brakemen on the road brakemen's seniority rosters are entitled to vote in any election held among road brakemen on this carrier.

The ORC also contends that approximately 23 conductors assigned and working as yard foremen in the so called "open" yards, and all other conductors on the road conductors' seniority rosters, are entitled to vote in any election held among road conductors on this carrier.

The BRT, on the other hand, contends that only those men who have worked a preponderance of their time in road service are entitled to vote as either road conductors or road brakemen; further, that road conductors and road brakemen, when engaged in yard service in the so called "open" yards on this carrier, are paid under yard rates, rules and working conditions and therefore are in a separate craft or class from men engaged in road service, viz., yard service; further, that men engaged in yard service a preponderance of their time should be voted as yardmen; those working a preponderance of their time in road service to be voted as either road conductors or road brakemen.

The ORC contention in effect is that there are no yardmen as such employed by this carrier except in the four "closed" yards; that all other men in train service, including those assigned and working as yardmen in the "open" yards, are roadmen.

FINDINGS OF FACT

The Spokane, Portland & Seattle Railway Company, Oregon Electric Railway Company and Oregon Trunk Railway is a carrier within the meaning of Section 1, First, of the Act. The employees involved in this case are employees as defined in Section 1, Fifth, of the Act. [3]

Section 2, Fourth, of the Act states:

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

Section 2, Ninth, of the Act states:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such

employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. . . In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier."

DISCUSSION

The Mediator's investigation developed from information furnished him by the carrier in September 1953 that the carrier then had the following numbers of men assigned to the classes of work indicated:

	Road Conductors	Road Brakemen
Astoria Division	7	21
Vancouver Division	39	112
Oregon Electric Division	12	25
Total	<u>58</u>	<u>158</u>

The total of 158 road brakemen includes a number of men on the brakeman's extra list. There are no extra boards maintained for road conductors. The carrier also reported the following number of men regularly assigned to yard service at that time: [4]

	Yardmen
Portland, Oregon Yard	76
Vancouver, Washington Yard	64
Astoria, Oregon Yard	3
St. Helens, Oregon Yard	4
Salem, Oregon Yard	8
Albany, Oregon Yard	9
Eugene, Oregon Yard	5
Sweet Home, Oregon Yard	3
Wishram, Washington Yard	17
Bend, Oregon Yard	9
Portland, Oregon, OE Yard	5
Total	203

In addition, the carrier reported that 14 other men had performed the preponderance of their time during the period August 16 to September 15, 1953 in yard service, this service being performed by men working in the so called "open" yards, making a total of 217 men in yard service during the period mentioned.

The yards at Portland, Vancouver, Astoria and St. Helens are commonly referred to on this carrier as the "closed" yards. Yardmen in those four yards are represented by the BRT under a schedule for yardmen effective December 1, 1952. Road conductors and brakemen have interchangeable rights with the yardmen in the Astoria and St. Helens yards these men also having rights to road service. This arrangement, however, does not affect the representation of yardmen in these two yards, which remains with the BRT under the December 1, 1952 agreement.

The testimony during the hearing showed that the men in yard service in the seven so called "open" yards are covered by the joint agreement effective April 1, 1925 between the carrier and the ORC and BRT. It was testified, without contradiction, that the men in yard service in these

seven yards are governed by the rates of pay, rules and working conditions specified in Article XIII through XXIII, both inclusive, of that agreement. These Articles cover most of the standard yard service rules, including the 8 hour day, overtime after 8 hours, unit assignment rule for the yard crew, fixed starting time rule for the first, second and third shifts, lunch period rule, designated point for going on and off duty, crew consist rule, extra payment when used in road service in emergencies, etc. It was also testified that road crews are not permitted to perform switching at the points where the "open" yards are established, when yard crews are assigned and are on duty. In general, the testimony showed that the men assigned to yard service in the seven "open" yards are compensated and perform their service in those yards under standard yard rates and working conditions.

There is also in effect an agreement signed February 12, 1948, between the carrier, the ORC and the BRT, governing the selection of personnel for the yard assignments at Wishram, Washington and Bend, [5] Oregon, placing these assignments under Articles XIII to XXIII, both inclusive, of the joint agreement of April 1, 1925, above referred to, and providing that such assignments will be bulletined and assigned on July 1 and January 1 of each year, and when bid in, the bidders can neither be displaced by senior men nor can they vacate such assignments for the six month period except under penalty of remaining on the extra board for the balance of the six-month assignment.

The carrier representative testified during the hearing that the foremen in all the yards on the property are reported to the Interstate Commerce Commission under Reporting Division 119, Yard Conductors (Foremen); also that all helpers in their yards are shown under Reporting

Division 120, Yard Brakemen (Helpers). The difference between road work and yard work has been recognized on this carrier for a great many years. The earliest contract quoted by the carrier representative at the hearing showing a distinction between road and yard work was dated March 1, 1914. Although the ORC witnesses in the hearing consistently refused to admit that the men assigned to yard work in the "open" yards have interchangeable road and yard rights, they referred a great many times to "yard service" as defining the work performed by the men holding such assignments in these yards. There seemed to be no difference of opinion between the two organizations that there is a clear and definite distinction between road service and yard service. The ORC contention was primarily that the men doing yard work in the "open" yards are roadmen, because they hold seniority only as roadmen and there is no yard seniority as such for the men working in these yards.

Yard service has been recognized for a great many years on the majority of rail carriers as a separate occupational classification and has on many occasions in the past been held by this Board to constitute a separate craft or class for representation purposes under the Railway Labor Act. The differences in the duties of road trainmen and men in yard service was fully described in the *Classification and Index of Steam Railroad Occupations*, issued by the United States Railroad Labor Board in 1921. These four occupational classifications and their descriptions are as follows:

Yard Conductor or Yard Foreman:

". . . positions in which the duties of incumbents are to supervise and assist the work of switchmen and helpers in yard switching and yard work train service, including supervision of the breaking up and making up of trains; and to perform related work." (Page 257)

Yard Brakeman or Yard Helper, Switchtender:

"... positions in which the duties of incumbents are to couple, uncouple and ride cars in connection with the breaking up and making up of trains; to handle switches; and to perform related work in connection with yard switching or switch tending service." (Page 208) [6]

Road Freight Brakeman or Flagman:

"... positions in which the duties of incumbents are to assist conductors in the operation and protection of freight trains; and to perform related work." (Page 257)

Road Freight Conductors:

"... positions in which the duties of incumbents are to have charge of the operation of freight trains en-route and at stations, between terminals; and to perform related work." (Page 256)

During the early years of this Board's experience, questions of employees with dual or interchangeable seniority, the voting of men who worked part time in two crafts or classes, and the specific question of whether yardmen (yard foremen, helpers and switchtenders) are a separate craft or class for the purpose of the Railway Labor Act, came before the Board for decision on many occasions. The following excerpts from some of the Board's earlier decisions, a number of which were reviewed and sustained by judicial authorities, bear particularly on the issues in the instant cases.

In its findings in Case R-276, decided August 13, 1937, representation of train and yard service of the Oklahoma Railway, the Board laid down the general principle that agreement coverage has no bearing on the determination of representation by craft or class in the following language:

"Further, the right of selection of representative by each craft or class is quite independent of any existing

agreement. No limit is placed in the law upon the right of a craft or class to select its representative and that right cannot be curtailed or limited by any existing agreement."

In the Board's findings in Case R-290, decided July 14, 1938, representation of road conductors, yard foremen, helpers and switchtenders, Pittsburgh & Lake Erie Railroad Co., the Board said:

"On most of the railroads in the United States yardmen constitute another such craft or class. It includes yard foremen or yard conductors, yard brakemen or yard helpers and usually also switchtenders."

And further in those findings the Board stated:

"In all elections held by the Board subsequent to 1935, the Board has uniformly treated yardmen as a single craft or class in accordance with the general practice as it existed on the railroads of the country prior to 1935." [7]

Still further in those findings, the Board made the following statements, which are particularly pertinent to the instant disputes:

"In view of all circumstances of the present case, as well as the customary practices and established precedents, the National Mediation Board is of the opinion that the yard foremen or yard conductors do not constitute a craft or class within the meaning of the Railway Labor Act. They are but a part of the craft or class of yardmen or switchmen which by long-established custom and practice includes all of the yardmen, including the switchtenders whose status of yardmen on this railroad is not questioned. All employees regularly assigned to service as yardmen are entitled to participate in the election and, as in the case of the road conductors, such unassigned extra men as devote

a preponderant amount of service to yard work are also eligible.

"The interchangeable duties of the employees in the various classes of service and the use of the 'Common Extra Board' on this railroad make it extremely difficult to distinguish the crafts or classes of employees for purposes of representation under the Railway Labor Act. As suggested above the contesting organizations might be best advised to agree to vote all the employees involved in the dispute as a single craft or class. But in view of the provision of the Act that each craft or class shall have the right to designate representatives, it is the judgment of the Board that the facts in the case establish that the representation of two crafts or classes of employees are in dispute:

1. Road Conductors.
2. Yardmen (foremen, helpers and switchtenders)"

On the subject of double voting in representation disputes and the manner of determining the craft or class in which a man will vote based on the preponderance of his service in a definite checking period, the following quotation from the Board's findings in Case R-125, decided October 11, 1935, representation of road conductors, Norfolk & Western Railway Co., outline specifically the Board's policy in these matters, which has remained unchanged throughout the years:

"Yard service employees may have seniority rights as road men and vice versa. Engineers and firemen also accumulate seniority in both crafts concurrently. Nevertheless, the established and recognized practice has been to vote employees only in the one craft in which they are employed at the time that an election is held. Any other practice would mean multiple voting and multiple representation, and would obliterate the lines between the crafts or classes which Section 2, Fourth and Ninth, clearly intend should be maintained." [8]

"The Board is of the opinion that the Railway Labor Act authorizes no such double voting. It has uniformly ruled that employees may vote in one craft or class only, and all its elections have been conducted accordingly. The first annual report of the Board referred to its rulings in these words:

'It has been claimed occasionally * * * that employees who have seniority rights in several crafts or who work interchangeably in more than one craft should have a vote in each craft in which they may thus have an interest. The Board has felt that the Act intended each employee to vote in one class or craft only, and has uniformly ruled accordingly, following a decision of United States District Judge Gordon in a case that arose on the Georgia & Florida Railroad.³'

"... It is common practice on all railroads for certain employees to perform part-time service in more than one craft. When they thus work part-time in two crafts, it customary to classify them for voting and representation purposes in the craft or class where they work a preponderant amount of time during a representative period. The reasonableness of this practice is attested to by many voluntary agreements made between employees' organizations involved in representation disputes. The most recent of these mutual agreements made by the two organizations involved in the present dispute was dated June 2, 1938, to apply as a rule for an election on the Boston & Albany Railroad.⁵ In contested cases the Board has uniformly followed the same practice.

The ORC contended that on many railroads switching operations in so-called small yards where no yard engines are assigned and certain industrial switching work is done by road crews, and is not considered to be work generally

3. First Annual Report, p. 22."

5. Cases R-452 and R-460."

assigned to men employed in the yardmen's craft or class. In support of their contentions, they referred to the following cases:

- R-1280—Representation of Road Conductors, Baltimore & Ohio RR
- R-1324—Representation of Road Conductors, Chicago & North Western Ry.
- R-1629—Representation of Road Conductors, Atlantic Coast Line RR
- R-1655—Representation of Firemen & Hostlers, Bush Terminal RR
- R-1775—Representation of Road Conductors, Int'l Great Northern RR
- R-1785—Representation of Road Conductors, Northern Pacific RR
- R-1813—2175, 2611, Representation of Road Conductors, Clinchfield RR
- R-2457—Representation of Road Conductors, Erie RR
- R-2530—Representation of Road Conductors, New York Central RR
- R-2721—Representation of Road Conductors, Colorado & Southern Ry. [9]

The files in each of the above cases have been examined. It was noted that in each and every one of these cases, the list of eligible voters was established by agreement between the organizations without the necessity of the Board passing upon any such questions as those raised by the ORC in the present cases. It was further noted in this examination of the above files that the crews referred to by the ORC are those performing switching at intermediate points and locations where no yard crews are regularly assigned. Such crews have always been considered to be in road service, some of them on certain roads being referred to as road switchers, roustabouts, or road dodgers, and in the main, those crews are paid local freight rates. In some few cases,

by negotiated agreement, crews performing such service receive yard rates, but they are still considered to be in road service. This situation applies particularly to the crews working out of Willbridge, on the Spokane, Portland & Seattle Railway.

It is clear to the Board that the commonly accepted distinction between road and yard service prevails on the Spokane, Portland & Seattle Railway and its operated subsidiaries; further, that the crews regularly assigned to yard switching work at the seven locations now referred to as "open" yards are in fact and in name also yardmen; that they are paid yard rates of pay and work under special yard rules in the joint agreement of April 1, 1925 between the carrier, the ORC and the BRT. In other words, they belong to the craft or class of yardmen, as above defined, and they are not roadmen. Accordingly, the Board has reached the following—

CONCLUSIONS

On the basis of the entire record in these cases, the National Mediation Board finds that representation disputes exist among the employees of the carrier in the three following crafts or classes:

- (1) Case R-2763, Road Conductors;
- (2) Case R-2753, Road Brakemen, including Flagmen and Baggage-men;
- (3) Case R-2805, Yardmen, including Yard Foremen, Yard Helpers and Switchtenders.

The craft or class of yardmen in Case R-2805 will include all men employed as yard foremen, yard helpers and switchtenders and who work under either the yardmen's agreement of December 1, 1952 or under the provisions of Articles XIII through XXIII of the joint agreement between the

carrier, the ORC and the BRT, effective April 1, 1925, wherever employed.

The eligible lists of employees in the three crafts or classes named above shall include all employees regularly assigned as (1) road conductors, (2) road brakemen, and (3) yardmen, as of June 1, 1954, and [10] also those employees who have worked a preponderance of their time in each of the three crafts or classes during the period April 1, 1954 through May 31, 1954. The usual provisions relative to men on sick leave, authorized leave of absence, extra and furloughed employees, men in military service, and men drawing total and permanent disability who are under the age of 65, will govern in the preparation of the three eligible lists.

A Mediator will be assigned to conduct an election among each of the three crafts or classes at an early date.

By direction of the NATIONAL MEDIATION BOARD.

E. C. Thompson
Secretary [11]

Appendix E**Submission to NRAB of SUNA**

File No.

Docket No.

*Ex Parte Submission**Before the National Railroad Adjustment Board*

Parties to { Switchmen's Union of North America
 Dispute { Southern Pacific Company (Pacific Lines)

STATEMENT OF CLAIM :

Claim is made for one day's pay at the yard rate of payment applicable for the senior switchman standing for service at Los Angeles Yard, Los Angeles Division, when brakemen were permitted to perform yard service as follows:

1960 Date	On Duty Time	Yard Job Worked	Brakeman Used
2/17.....	11:59 PM	524	Lee Roberts
2/17.....	11:59 PM	524	G. W. Gallagher
*	*	*	*

[1]**STATEMENT OF FACTS :**

Under the Yard Agreement in effect on the Southern Pacific (Pacific Lines), prior to September 14, 1959, agreement rules were in effect to permit brakemen to transfer to yard service on a temporary basis when such brakemen desiring to transfer could not work fifty (50) per cent of the time in road service. The provisions permitting the use of brakemen read as follows:

"ARTICLE 23

Section (a). Yard employes will have no rights in train service and vice versa, but if temporarily employed, they will not lose their rights within sixty (60) days.

Note: 1—The loss of seniority after sixty (60) days will not apply to switchmen used in train service who, account slack business, cannot work fifty (50) per cent of their time as switchmen; Local Chairman and local officials will determine percentage by checking back for a fifteen (15) day period.

Note: 2—Brakemen who temporarily transfer to yard service account being unable to work fifty (50) per cent of their time in road service, as [3] provided for by Interpretation Agreement TRN 1-299, signed at San Francisco, April 2, 1942, shall take temporary rank on switchmen's consolidated list as of date of first service and shall retain such seniority until released due to the provisions of Article 47, Section (a) and NOTE, Trainmen's Agreement.

In yards where brakemen are temporarily working under the provisions of this Article, if switchmen junior in seniority to such brakemen are unable to work ten (10) shifts in a two-week period in that yard, Superintendent or his authorized representative, at request of the Local Chairman, SU of NA, will remove sufficient brakemen from the working list in that yard prior to the expiration of the fifty-nine (59) day period in reverse seniority order to the extent necessary to enable such junior switchmen to work, if possible, at least ten (10) shifts in a two-week period. To determine the time worked by such junior switchmen, Local Chairman, SU of NA, and authorized representative of the Superintendent will check back for the two weeks immediately preceding 12:01 A.M., Monday of the week in which Local Chairman, SU of NA, makes the request.

(See YDM 1-78 and TRN 1-299, Appendix B.)"

"YDM 2-7

December 1, 1939

Mr. R. J. Brooks
General Chairman, BRT,
Pacific Building,
San Francisco, Calif.

Dear Sir:

This letter will confirm understanding reached with respect to the application of each the Trainmen's Agreement which becomes effective December 16, 1939, excluding former El Paso and Southwestern Railroad, and the Yardmen's Agreement which becomes effective November 16, 1939, excluding former El Paso and Southwestern Railroad, respectively. The understanding was, that:

In view of the fact that the General Committee of the Brotherhood of Railroad Trainmen is authorized to and represents the two classes of employes, i.e., trainmen [4] and yardmen, employed on the Southern Pacific Company (Pacific Lines), and the further fact that the agreements herein referred to for those two classes of employes were negotiated by said General Committee, it is mutually agreed that none of the provisions of the Trainmen's Agreement, which becomes effective December 16, 1939, shall be construed by either party as being in conflict with any provisions of the Yardmen's Agreement, which became effective November 16, 1939; likewise, no provision of the Yardmen's Agreement, which became effective November 16, 1939, shall be construed by either party as being in conflict with any provisions of the Trainmen's Agreement effective December 16, 1939.

If you concur, please signify your acceptance in the space provided herein.

Yours truly,
(Signed) R. E. Beach
Assistant Manager of Personnel
Southern Pacific Company

ACCEPTED:
(Signed) R. J. Brooks
General Chairman
Brotherhood of Railroad Trainmen"

INTERPRETATION AGREEMENT

This Agreement between the Southern Pacific Company (Pacific Lines) and the Brotherhood of Railroad Trainmen, constitutes an interpretation of Article 47, Section (a) and Note, of the Trainmen's current Agreement, reading as follows:

'Section (a). Yard employes will have no rights in train service, and vice versa, but if temporarily so assigned shall not lose their rights therein within sixty (60) days.

NOTE: The above not to apply to trainmen used in yard service, who, account slack business, are unable to work 50% of the time as trainmen. Local Chairmen and Local Officials shall determine percentage by checking back for a period of fifteen (15) days.' [5]

"Item 1:

Trainmen desiring to temporarily transfer from train service to yard service will make application, in writing, to Superintendent, and, if approved, the following will govern:

Item 2:

Application will not be approved if check shows that for the last 15 consecutive days preceding the date of application the trainman could have worked 50% of those days in train service on the seniority district from which he desires to transfer.

Item 3:

Trainmen who transfer to yard service under Item 1, will take seniority rank on the yardmen's division seniority roster as of the date of first service and will retain such seniority until released under the provisions of Article 47, Section (a) and Note, Trainmen's current Agreement.

Item 4:

If a trainman who transfers under Item 1, desires to make a permanent transfer to yard service on the division to which temporarily transferred, and provided same is approved by Superintendent or Superintendents involved, seniority rank on the switchmen's division seniority roster will be as of 12:01 A.M. of the date transfer is approved.

If additional yardmen are hired on the division during the period the trainman is being used in yard service, men so hired will be junior to the trainman who transferred under the provisions of Item 1; however, when working list is reduced, the trainman or trainmen will be first reduced in reverse seniority order, unless they have permanently transferred to yard service under the provisions of this Item.

Item 5:

Superintendents will furnish Local Chairmen, BRT, having jurisdiction over trainmen and yardmen, the names and seniority date of trainmen who transfer to yard service, either temporarily or permanently.

Item 6:

This interpretation Agreement becomes effective April 22, 1942, and cancels any other interpretation of Article 47, Section (a) of the Trainmen's current Agreement, with which it conflicts. [6]

"Signed at San Francisco this 2nd day of April, 1942."

(Signatures not reproduced)

On October 1, 1957 the duly authorized representatives of the class and craft of employes covered by the yard agreement involved herein served a Section 6 Notice under the application of the Railway Labor Act, asking and demanding a change in rules in part as follows:

"COMPANY FILE YDM 2-7 OF DECEMBER 1, 1939, IS CANCELLED INsofar AS IT PERTAINS TO THE CHANGES HEREIN INDICATED."

"Article 23, Section (a)

(Cancel Present 23(a) and Substitute:)

Yard employes will have no rights in train service and vice versa, but if switchmen are temporarily employed in road service, they will not lose their rights within sixty (60) days.

Note: The loss of seniority after sixty (60) days will not apply to switchmen used in train service who, account slack business, cannot work fifty (50) per cent of their time as switchmen; Local Chairman, SUNA, and local officials will determine percentage by checking back for a fifteen (15) day period."

The employes' notice to cancel the old Article 23, with its reference and application to brakemen being permitted to work in yards where the yard agreement was applicable, and adopt a new Article 23 eliminating provisions for brakemen to work in the yard, was handled under the provisions provided for by the Railway Labor Act. In mediation proceedings being held on the property during August of 1959 it was agreed the new rule as proposed would be granted. Subsequently, and on September 14, 1959 the new Article 23, Section (a) became effective. With cancellation of the old Article 23(a) and adoption of the new, the parties removed from the yard agreement the provisions that had been in effect for a long number of years permitting brakemen to transfer to service arising under the yard agreement, establish a temporary seniority date, and work in accordance therewith.

At times and dates shown in statement of claim the carrier permitted brakemen to be used in yard service on jobs indicated. All of the employes named in statement of claim

had previously established seniority dates as brakemen in the carrier's service. All of the employes so named retained their prior seniority dates as brakemen while they were being used in yard service as indicated, and their seniority as brakemen continued to accumulate while they were being used in yard service. [7]

At the conclusion of their use in yard service (March 16, 1960) all of the employes named in statement of claim were recalled to service on the brakemen's board with their prior seniority date as brakeman applicable to each.

A claim was entered, consistent with the statement of claim herein, and was denied, except that a claim entered and handled to a conclusion on the property included the name, and service performed by another employe (R. M. Collins) who was a switchman properly transferred to the Los Angeles Yard for service. The service performed by R. M. Collins during the period involved in this claim is, therefore, removed from the claim in the presentation now made.

EMPLOYES POSITION:

A Yard Agreement covering Rates of Pay and Rules, in effect on the dates of this claim is on file with the Board and is hereby made a part of this submission. Directly involved herein are the following rules:

"ARTICLE 2

Section (a). Eight hours or less shall constitute a day's work."

"ARTICLE 12

Section (b). The senior switchman in point of service will have the choice of engines."

"ARTICLE 23

Section (a). Yard employes will have no rights in train service and vice versa, but if switchmen are temporarily employed in road service, they will not lose their rights within sixty (60) days.

NOTE: The loss of seniority after sixty (6) days will not apply to switchmen used in train service who, account slack business, cannot work fifty (50) per cent of their time as switchmen; Local Chairman, SUNA, and local officials will determine percentage by checking back for a fifteen (15) day period."

It is the employes' position in this case that the carrier improperly permitted brakemen to work in Los Angeles Yard at times and dates of claim; that there was no provision in the yard agreement to permit the use of such employes, *account such permissive rules had been removed from the yard agreement some five (5) months previous*; (see employes facts); therefore, the use of the brakemen as switchmen in yard service violated the provisions of the yard agreement heretofore reproduced. Accordingly, the claims should be sustained in line with binding yard settlements and Special Board Awards applicable to circumstances where brakemen are used in yard service. [8]

Attached as the Employes Exhibit "A" is a copy of Decision No. 1405, Special Adjustment Board No. 18, which decided a yard claim arising under the yard agreement rules in effect on this property. In Decision 1405 the Special Board considered a claim of the senior switchman standing for service performed by a brakeman *who had not properly invoked the provisions of Article 23, Section (a) of the yard agreement so that he could be properly used in yard service*. A brief review of Exhibit "A" reveals the following:

"Brakeman Frost had not made application in writing to temporarily transfer to yard service as provided by TRN 1-299."

"... yardmen . . . were within the meaning of the rules of agreement and interpretation thereof to be considered available for the service performed by Brakeman Frost; and Brakeman Frost was therefore

improperly used to the exclusion of available yardmen *and in violation of the rules, interpretations and understandings.*" (Emphasis added)

It follows that the yard agreement rules prohibit the use of brakemen to perform yard work *unless procedures are followed which properly permit brakemen to work in yard service.* And where such procedures have been removed from the yard agreement, and thus are no longer available for application, any use of brakemen is contrary to the yard rules.

Attached as the Employees Exhibit "B" is a reproduction of the handling leading to settlement of claim covered by the carrier's file 148-3173. Sheets 1 and 2 of Exhibit "B" reproduce the General Chairman's (SUNA) letter of November 5, 1954, file Sac-73; sheets 3 and 4 reproduce the carrier's letter of December 13, 1954, file YDM 148-3173 wherein reasons for initial denial of the claim are set forth, and sheet 5 shows that the claim was disposed of by settlement adjustment, on the basis that the brakemen were improperly used to perform the yard service over the period of time involved.

Attached as the Employees Exhibit "C" is a photostatic copy of carrier's records showing the dates the brakemen employees herein transferred to the Los Angeles Yard board as "*loaners*" and the dates the same employees were "*Recalled to Brakemen's Board.*"

The Board will note that Sheet 1 of Exhibit "C" lists S. R. Albrecht, V. W. Enderle, G. W. Gallagher, N. D. Hollis, R. B. Moore, J. E. Richcreek, Lee Roberts and G. D. Spainhower all as *loaners*. "Loaners" is a term applied to brakemen employees who are "loaned" from the brakemens board. The Board will also note on sheet 1, the date such brakemen marked upon the yard board. [9]

Sheet 2 of Exhibit "C" shows the date *these same employes* were *recalled to the brakemen's board*. The instant claims all arise during the period of time these same brakemen employes of the carrier performed yard service at the carrier's Los Angeles Yard.

All data and argument herein has been presented to carrier and discussed in conference as required by the Railway Labor Act as amended. Oral hearing is waived.

We, therefore, request a sustaining award in this claim.

Respectfully submitted,

/s/ JOHN R. BURGE

John R. Burge, General Chairman
Switchmen's Union of North America
Southern Pacific Co. (Pacific Lines)
268 Market Street—Room 333
San Francisco 11, California

cc—Mr. K. K. Schomp
Manager of Personnel
Southern Pacific Company
65 Market Street
San Francisco 5, Calif.

[10]

Submission to NRAB of Southern Pacific

Docket No.

*Before the National Railroad Adjustment Board***First Division****In the Matter of****Switchmen's Union of North America****vs.****Southern Pacific Company (Pacific Lines)****STATEMENT OF CLAIM:**

"Claim is made for one day's pay at the yard rate of payment applicable for the senior switchman standing for service at Los Angeles Yard, Los Angeles Division, when brakemen were permitted to perform yard service as follows:

1960 Date	On Duty Time	Yard Job Worked	Brakeman Used
2/17.....	11:59 PM	524	Lee Roberts
2/17.....	11:59 PM	524	G. W. Gallagher

[1]

(The above-quoted statement of claim is the same as that contained in the ex parte submission of the Switchmen's Union of North America; it is used solely for identification and its use does not constitute an adoption thereof.)

The Southern Pacific Company-Pacific Lines (hereinafter referred to as the carrier), in response to notice by First Division, National Railroad Adjustment Board, that the Switchmen's Union of North America (hereinafter referred to as the petitioner) has filed an ex parte submission, and

request that the carrier file its answer in the matter of the above claim, respectfully submits the following: [3]

CARRIER'S STATEMENT OF FACTS

1. An agreement effective September 1, 1956 (hereinafter referred to as the "current agreement"), covering wages and working conditions of carrier's yard service employes, hereinafter referred to as "switchmen", has been filed with this Board and is hereby made a part of this submission.

2. Prior to November 26, 1951, the Brotherhood of Railroad Trainmen was the authorized collective bargaining agent of carrier's switchmen; however, subsequent to that date, pursuant to certification by the National Mediation Board, the Switchmen's Union of North America has been the statutory agent of carrier's switchmen.

3. The following individuals were employed as switchmen at Los Angeles on dates shown:

Name	Date 1960
S. R. Albrecht	2/18
V. W. Enderle	2/23
G. W. Gallagher	2/14
N. D. Hollis	2/23
R. B. Moore	2/24
J. E. Richcreek	2/24
L. Roberts	2/17
G. D. Spainhower	2/18

Copies of their respective applications for employment as switchmen, prepared individually by them on the above-noted dates, are attached hereto as Carrier's Exhibit "A".

The above-identified individuals thereafter established seniority as switchmen in the same manner as any other person newly employed as such and were used in turn from

the switchmen's seniority extra board or on regular assignments, through exercise of their [4] newly established seniority as switchmen in Los Angeles Yard, as follows:

Switchman S. R. Albrecht

Date 1960	Job No.	Time On Duty
2/18.....	711	11:59 PM
2/19.....	716	3:59 PM

* * * * *

Switchman V. W. Enderle

2/25.....	519 (not 791)	11:59 PM
2/29.....	752	3:59 PM

* * * * *

Switchman G. W. Gallagher

2/17.....	524	11:59 PM
2/18.....	642	11:59 PM [5]

* * * * *

Switchman N. D. Hollis

2/25.....	792	11:59 PM
2/26.....	752	3:59 PM

* * * * *

Switchman R. B. Moore

2/25.....	711	11:59 PM
2/26.....	752	3:59 PM

* * * * *

Switchman J. E. Richcreek

2/26.....	734	3:59 PM
2/29.....	734	3:59 PM

* * * * *

Switchman L. Roberts

2/17.....	524	11:59 PM
2/18.....	642	11:59 PM [6]

* * * * *

Switchman G. D. Spainhower

2/18.....	711	11:59 PM
2/25.....	569	11:59 PM

* * * * *

4. The above-named individuals had been in service with carrier as brakemen (for less than two weeks in most instances and prior thereto with the Union Pacific Railroad), but because of insufficient work as brakemen they were cut off from such service and were then reemployed by carrier as switchmen at Los Angeles Yard. When carrier again needed additional brakemen, the above-named individuals had the option of continuing in carrier's service as switchmen, with seniority as such from date so established following their employment as switchmen, foregoing any rights they may have had under the agreement covering carrier's trainmen, represented by the Brotherhood of Railroad Trainmen; or, resigning as switchmen, thereby terminating their seniority and status as such under provisions of the current agreement and accepting service as brakemen. Each of the above named accepted the latter option as of March 16, 1960. [7]

5. Claim was presented and progressed for one yard day at the applicable rate of pay for the senior switchman standing for the service performed each date and time set forth above by the switchman named, based on the premise that brakemen were improperly used in yard service at those times and dates.

POSITION OF CARRIER

No switchman at Los Angeles Yard was deprived of his seniority rights or exercise thereof as a result of service performed by Switchmen Albrecht, Enderle, Gallagher, Hollis, Moore, Richcreek, Roberts and Spainhower on the various dates here involved. Those individuals were employed by carrier as switchmen on the respective dates shown in paragraph 3 of "Carrier's Statement of Facts" and they established seniority as switchmen at Los Angeles as of

their first day of compensated service as such, in the same manner as any other person newly employed by carrier for service as switchman at that point. They were used as switchmen on dates of this claim in accordance with their acquired seniority as switchmen and their resultant standing on the extra board for such service, or on regular assignments acquired through exercise of such seniority, in strict compliance with all applicable provisions of the current agreement and in the same manner as any other newly employed switchman. Their status with relation to other switchmen in Los Angeles Yard was no different than the status of any other newly employed switchman and their use for service at the various times and dates specified in this claim, being under the same conditions and agreement provisions applicable to any person newly employed by carrier as switchman, was [8] thus without prejudice to the rights of any other switchman in Los Angeles Yard. In this connection the Board's attention is directed to claims involving a similar issue that were denied by this Board without aid of a referee in Awards 17653 and 18275.

Absent a showing by petitioner that carrier is restricted by some provision of the current agreement from freely selecting persons who it desires to employ as switchmen, carrier asserts that it has this exclusive prerogative. No showing to the contrary is made by petitioner and it cannot do so for the simple reason that no such restriction exists. The fact that a person selected by carrier for employment as a switchman might have and retain latent seniority as a brakeman (whether with this carrier or some other) would certainly not have any effect whatever on the basic right of selection, absent some contractual obligation specifically precluding such action. It is a fact which cannot be successfully refuted by petitioner that through the years carrier

has employed any number of persons as switchmen who were at the time in a cut-off status as brakeman, fireman, yardman, clerk or whatever from some other railroad, with retention of their seniority and subject to recall when needed (a common circumstance in the railroad industry) without any exception being taken thereto by petitioner. That is precisely what occurred in the instant case with the one immaterial exception that the persons employed as switchmen in this case had been cut off as brakemen by this carrier, immediately prior to such employment, instead of some other. It should be noticed that each of these employees (except one) had previously worked as a brakeman for the Union Pacific Railroad and it is an irrefutable fact, supported by [9] past occurrences, that petitioner would not challenge carrier's right to employ cut-off Union Pacific brakemen as switchmen, notwithstanding the fact they undoubtedly would retain (and perhaps still did) latent seniority as brakemen on the Union Pacific. Moreover, the question of a brakeman's right to retain latent seniority as such, whether with this carrier or some other, while employed as a switchman, is strictly a question that addresses itself to the organization representing brakemen and the agreement covering such employees.

In its "Statement of Facts" petitioner cites rules of the agreement and interpretations thereof, in effect prior to the date of the current agreement, which permitted brakemen to *transfer* to yard service *on a temporary basis*, if they made application in writing and if they could not work fifty (50) percent of the time as brakemen, and the action taken to cancel such provisions. They fail to mention a corollary request for a new rule presented by petitioner in the same proceedings, which read:

“Employees of the Company holding and accumulating seniority in another class and craft will not be permitted to acquire seniority as switchmen, temporary or otherwise, while still holding seniority in another class and craft; except this will not apply to employees promoted in accordance with Article 12, Section (a) of the current Yard Agreement.”

Carrier declined to grant the above-requested rule and it was withdrawn by petitioner. When considered in the light of the above-quoted proposed rule, it is clear that the agreement provisions cited by petitioner applied primarily to brakemen who, while still having a working status, were unable to work fifty percent of their time as brakemen and desired to *temporarily transfer* into yard service, as [10] distinguished from circumstances where brakemen, cut off account insufficient work to permit them to retain a working status, seek employment as switchmen and who, when so employed, establish seniority as such in the same manner as any other newly employed switchmen, with the option of continuing in service as switchmen with such acquired seniority even though they might, at some later date, stand to be recalled for service as brakemen, as in the instant case. In this connection carrier submits that petitioner's submission of this claim is simply an attempt on its part to secure a rule which it could not obtain through the process of negotiations.

It is thus abundantly clear that none of the provisions of the current agreement, cited and relied on by petitioner, are involved in any way in this claim and under the circumstances neither the agreement provisions cited nor any other supports the claim presented.

Unable to cite any agreement provision or produce any authoritative evidence in support of its contention that the above-named individuals were not switchmen on dates of claim, petitioner attaches a photostatic copy of carrier's

Form CS 1132, covering changes in occupation, as Employee's Exhibit "C" and, in connection therewith, lays great stress on the word "loaner" appearing next to their names thereon, pointing out that "loaner" is a term applied to brakemen employees who are "loaned" from the brakemen's extra board. Carrier asserts that such reference in this instance was strictly an error on the part of the individual preparing said form and cannot be construed as a binding commitment on behalf of carrier. In any event, that notation, per se, does not change the fact that said individuals [11] were actually employed as switchmen and were in such a status on dates of claim. In this connection it will be noted that in the case covered by Award 18275 a "loaner" was also involved and that fact *did not alter* said "loaner's" status *as a new employee* in that case.

In addition to the agreement provisions cited, petitioner refers to Decision No. 1405 of Special Adjustment Board No. 18 and settlement covered by Company file YDM 148-3173. In each of those cases brakemen were improperly permitted to *temporarily transfer* into yard service under agreement provisions and interpretations then in effect (which were not in effect on dates here involved), as distinguished from the instant case where the individuals involved were in fact *employed as switchmen*. As a consequence, neither of those citations are involved or apply in this case.

In essence, petitioner is here challenging carrier's right to employ switchmen from whatever source available. This Board has long recognized and affirmed certain inherent prerogatives of management, including the right to supplement and otherwise regulate its working force in accordance with the requirements of the service. See Awards Nos. 12336, 15119, 15600, 15601, 15570, 15750 and 16032, which are

but a few of such awards. In the interest of brevity, carrier will quote from the "Findings" of only two of those awards.

In Award 12336, this Division stated in the Findings, in part, as follows:

"The choice of personnel to discharge responsible duties in industry and commerce everywhere is recognized as the prerogative of management." (emphasis added) [12]

In Award 15570, this Division stated in the Findings, in part, as follows:

"This Division does not have the right to determine the employment policies or standards of the carrier." (emphasis added)

Carrier asserts that the principle enunciated in the above-quoted excerpts from the "Findings" in Awards Nos. 12336 and 15570 is applicable to the instant case and controls. The acquisition of new switchmen is the prerogative of carrier, as is the source from which they are obtained.

CONCLUSION

Carrier submits that the claim presented herein is without merit or agreement support and respectfully requests that said claim be denied.

All data herein submitted have been presented to the duly authorized representatives of the employes and are made a part of the particular question in dispute.

Carrier joins petitioner in waiving oral hearing.

FOR THE CARRIER:

/s/ K. K. Schomp

Manager of Personnel

San Francisco, California

November 8, 1961 [13]

No. 19551

In the
United States Court of Appeals
For the Ninth Circuit

WEST LOS ANGELES INSTITUTE FOR CANCER
RESEARCH, a corporation,
Appellant,

v.

WARD MAYER, MARJORIE MAYER, R. W. MAYER,
and TIMBER STRUCTURES, INC., a corporation,
individually and as successors in interest
to WARD MAYER STRUCTURES, INC.,
Appellees.

PETITION FOR REHEARING

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, *Judge*

McCOLLOCH, DEZENDORF & SPEARS

FRANK H. SPEARS

HERBERT H. ANDERSON

JAMES H. CLARKE

GEORGE L. KIRKLIN

800 Pacific Building

Portland, Oregon 97204

Attorneys for Appellant

FILED

SEP 2 1985

WM. B. LUCK, CLERK

No. 19551

In the

United States Court of Appeals For the Ninth Circuit

WEST LOS ANGELES INSTITUTE FOR CANCER RESEARCH,
a corporation,
Appellant,

v.

WARD MAYER, MARJORIE MAYER, R. W. MAYER
and TIMBER STRUCTURES, INC., a corporation,
individually and as successors in interest
to WARD MAYER STRUCTURES, INC.,
Appellees.

PETITION FOR REHEARING

Appeal from the United States District Court
for the District of Oregon
HONORABLE GUS J. SOLOMON, *Judge*

PETITION FOR REHEARING

The decision herein is in irreconcilable conflict with the findings of the trial court and the decisions of the Oregon and United States Supreme Courts. The holding is based upon misunderstanding of the facts and misapplication of the law.

I

Finding of Settlement. The Court erred in granting rescission based on an occurrence in 1954 in view of the finding of the trial court that the parties negotiated and concluded an enforceable settlement of their dispute in

1956. Settlement merges and extinguishes all antecedent claims. Any right to rescind based on the 1954 Revenue Ruling was merged in and extinguished by the 1956 settlement. Furthermore, the settlement agreement, which the trial court found was approved by the parties, expressly provided for "mutual releases" (Exh. 106).

II

Election. Appellant claims that plaintiffs failed to make a prompt election to rescind upon the occurrence of the frustrating event and thereby waived their right to this remedy. This Court erroneously considered the question one of waiver involving intention to surrender a right. When the word "waived" is used in the sense of election, "the requisite of even apparent intention to surrender a right is absent." 5 Williston, Contracts, 275 § 684 (3d Ed). The law simply does not permit a party to exercise two inconsistent rights. Sellers did not elect to rescind after the frustrating event in 1954. The trial court found that sellers in 1956 negotiated for and arranged a conveyance which provided for a payment of \$50,000 plus attorney's fees, indemnity from taxes, and mutual releases. This finding of a choice by sellers inconsistent with rescission results in an election which barred rescission regardless of intention.

This Court considered cases on laches which are not applicable to the question of election. Injury to another,

change of position, or loss of evidence may be relevant to the question of timeliness of demand, but are not relevant to a choice of two inconsistent courses of action.

This Court failed to notice that plaintiffs, after the right to rescind arose, continued to treat the contract as binding, accepted payments under it, and sought to amend its terms—all acts which bar rescission.

Contrary to the record of wildly fluctuating earnings, this Court held that the business was not speculative, but in any event it failed to consider the principal “speculative delay” in which plaintiffs engaged; that is, whether they wanted the properties back if they had to pay a tax on repossession (Tr 172, 424, 457).

III

Unclean Hands. This Court correctly holds that Mayer’s offense was serious and a violation of a vital public policy. The offense is correctly described as “deliberate concealment of significant facts from the taxing authorities.” But only plaintiffs participated in the concealment, and the Court erroneously holds that the parties were not *in pari delicto*. The Court fallaciously discusses the *omission* of facts from the writing instead of *concealment* and fails to notice the rule that Seagraves’ conduct cannot be imputed to the directors of the Institute.

Taylor v. Grant, 204 Or. 10, 279 P2d 479, 281 P2d 704 (1955), is not authority for disregarding the unclean hands disqualification against *one seeking rescission*. It is authority for the importance of the rule which requires return of consideration to the wrongdoer as a condition precedent to rescission—a rule which will not be defeated by the necessity of a second suit when the consideration could not initially be returned to the wrongdoer because it was in the hands of one not a party to the first suit. *Taylor v. Grant* supports appellant's claim that the consideration paid by defendant to sellers would have to be returned as a condition precedent. This Court failed to pass upon that specification of error.

This Court misstates that the trial court found that Mayer's motive was not to gain a tax advantage by concealing a relevant fact. No such finding was made. Such conclusion is precluded by Mayer's admission (Mayer's Dep'n, Exh. 151 pp. 42-3) and the admission in the pretrial order that the rescission agreement was made orally because if known "might undermine the *bona fides* of the whole transaction in the eyes of the Internal Revenue Service" (R. 226). The parties are bound by the pretrial order (3 Moore's Fed. Prac., 2d Ed., 1127) which in Oregon provides that upon filing "the pleadings pass out of the case and are superseded" (R. 287).

Oregon has never considered the unclean hands doctrine to require injury to adverse party, government or third party. In Oregon the rule "*is invoked as grounds of public policy and for the protection of the integrity of the court.*" *Taylor v. Grant*, 279 P.2d 479, 485. In the Federal courts the maxim is "self-imposed" without regard to behavior of the adverse party. See *Precision Instr. Mfg. Co. v. Automotive M. Mach. Co.*, 324 U.S. 806, 65 S. Ct. 993, 89 L. Ed. 1381 (1945), where concealment of facts in a patent application barred relief even though the opponent was the active party in the concealment. This opinion herein is clearly in conflict with that decision of the United States Supreme Court.

IV

Modification of contract by inadmissible oral evidence.

Contrary to the opinion herein, the trial court found that the risks of adverse tax consequences were foreseen by plaintiff (R. 315). The court relies on parol evidence of an oral agreement to conclude that the Institute assumed that risk. This evidence was inadmissible. The trial court found the oral agreement within the statute of frauds, and under the strict Oregon statute, evidence thereof was inadmissible. Oregon's likewise strict parol evidence rule also prohibited introduction of such evidence.

Although recognizing these rules, the trial court admitted the evidence for the purpose of aiding in inter-

pretation or construction of the written agreement. There was no ambiguity to interpret and *the court did not use the evidence to construe the written terms*. Instead, the trial court erroneously concluded that “Once this evidence was admitted, it is obvious that the entire agreement was not completely integrated.” (Tr. 1197). The court then added the oral agreement as an additional term of the contract. This Court disregarded Oregon’s face of the instrument test of integration and the statute of frauds’ prohibition against admissibility. The issue is no less avoided because the Court said in footnote that the evidence was admissible to aid in interpreting the contract. There was no interpretation of any part of the written contract. The oral agreement was considered an additional contract term and made the keystone of this decision.

Contrary to this Court’s opinion at page 6, the trial court did not find that the Mayers did not intend to assume the risks of adverse tax consequences. The trial court did find that because of the risks of adverse tax consequences, Ward Mayer wanted “an exculpatory clause written into the documents.” (R. 315). This Court says that sellers “requested assurances that the property would be returned” in the event of adverse tax consequences. Such assurances would be requested for only one reason—that sellers had such risk and desired a remedy if it occurred. The promise of return

in the event sellers suffered the risk does not prove that sellers had no risk, but the contrary. Where plaintiffs seek and obtain protection by an oral agreement from adverse tax consequences, the occurrence of that planned for event is here said to be frustration. We respectfully submit that this gap in reasoning calls for re-analysis.

Where the disappointment is foreseen and planned for by oral agreement, but the planning is imperfect due to a desire to conceal the plan from IRS, will a court of equity perfect the plan for plaintiffs? Should a businessman be allowed to rely upon an oral agreement made with deliberate intention to conceal it from Internal Revenue Service? Should the directors of a public foundation be bound by an unknown conspiracy to conceal significant facts from Internal Revenue Service? These issues presented by the appeal were not passed upon by this Court.

V

Frustration. This Court affirms on the ground that the sale and lease were frustrated by a Revenue Ruling issued by the Commissioner of Internal Revenue in 1954. The Court cites *Borup v. Western Operating Corp.*, 130 F.2d 381, 386 (2d Cir. 1942), and *Dorsey v. Oregon Motor Stages*, 183 Or. 494, 194 P.2d 967, 971 (1948), for the proposition that where valid change of law pro-

hibited performance under criminal penalty and the promisor recognized and complied with the law, its failure to perform the prohibited act was excused. This Court recites that “the ruling denied” the anticipated tax benefits and “would make it impossible for the operating company to make the contemplated payments to the Institute.”

The opinion makes clear that this Court is mistaken as to the effect of a Revenue “Ruling” which is not a “rule,” order or law. It exercises no compulsion of any kind.

Borup and *Dorsey*, *supra*, involved executive and administrative orders with the force of law. This Court mistakenly assumed a Revenue Ruling to be the same. It is not—it is merely an adversary’s opinion in another case which a taxpayer is not required to follow. In *Borup* and *Dorsey* the parties recognized and followed the executive orders. Here, plaintiffs refused to comply with the Ruling although the opinion misstates that the Ruling *denied* tax consequences and that *application* of the Ruling “rendered performance impossible.” The Ruling *denied nothing*—it had no power to do so. It was *never applied* to this transaction and did not affect performance. Plaintiffs rejected it, and correctly asserted that it did not apply to them. The operating company continued through all the years to deduct rent for tax purposes (it was on the accrual basis) (Exhs. 566 to

76), and sellers paid tax on payments at only capital gain rates (Exh. 580). The opinion fails to note that plaintiffs were not intimidated by the invalid Ruling. It is based on a complete misunderstanding of the nature of a Ruling and its factual effect in this case.

The Court misstates the facts in saying that the consideration bargained for was \$2,500,000 entitled to capital gain treatment. The Institute could promise nothing with respect to tax treatment. The contract contains no such condition. Nor could the monetary consideration be varied by parol evidence. *Coker & Belamy v. Richey*, 104 Or. 14, 22, 202 Pac. 551, 204 Pac. 45, 204 Pac. 947 (1922); *Ramirez v. Ringo*, 202 Or. 1, 3, 211 P2d 657 (1954); *Elliott Contracting Co. v. Portland*, 8 Or. 150, 171 Pac. 760 (1918); *United States Nat. Bank v. Miller*, 122 Or. 285, 295-296, 258 Pac. 205 (1927).

“ * * * [A] purely money consideration mentioned in a written instrument, which is complete upon its face, cannot be amplified by parol evidence so as to ingraft into the instrument an additional executory or contractual consideration. * * * ” *Marks v. Twohy Bros. Co.*, 98 Or. 514, 529, 194 Pac. 675 (1921).

The office of the judge is to ascertain what is contained in the instrument and “not to insert what has been omitted” (ORS 42.230). The court’s conclusion

that the contract was not integrated and that additional terms of consideration could be shown by parol is in conflict with the Oregon statutes and decisions.

Conclusion. Since the court failed to pass upon several issues presented by the appeal, further examination is required. Analysis of these questions and the irreconcilable conflicts presented by the opinion will require re-examination of other issues. The tender conscience of the chancellor is not easily satisfied and in this case a rehearing is both appropriate and necessary to a full consideration.

McCOLLOCH, DEZENDORF & SPEARS

FRANK H. SPEARS

HERBERT H. ANDERSON

JAMES H. CLARKE

GEORGE L. KIRKLIN

Attorneys for Appellant

CERTIFICATE

I HEREBY CERTIFY that the foregoing Petition for Rehearing is, in my judgment, well founded and is not interposed for delay.

HERBERT H. ANDERSON
Attorney for Appellant

No. 19515 /

IN THE

*Filed
Vol. 3324*

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRENE LUCERO,

Appellant,

vs.

THOMAS W. DONOVAN, *et al.*,

Appellees.

PETITION FOR REHEARING.

ROGER ARNEBERGH,

City Attorney,

BOURKE JONES,

Assistant City Attorney,

WILLIAM B. BURGE,

Deputy City Attorney,

Room 1814, City Hall,

Los Angeles, Calif. 90012,

Attorneys for Appellees.

FILED

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RECEIVED, CLERK

No. 19515

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRENE LUCERO,

Appellant,

vs.

THOMAS W. DONOVAN, *et al.*,

Appellees.

PETITION FOR REHEARING.

Appellees Conrad, Wells, Buczek and Cobb hereby respectfully request this Honorable Court to grant a rehearing in the above entitled action for the following reasons and upon the following grounds:

1. The court is requested to change its opinion insofar as it holds that appellee Conrad did not have probable cause for the arrest of appellant Lucero. At pages 8 and 9 of the opinion the court referring to the arrest stated "without more, this can hardly furnish adequate probable cause for arrest without warrant." The following is additional evidence not mentioned in the opinion bearing on the arrest which amounts to probable cause to wit:

(a) Conrad asked appellant Lucero if the pills and capsules found by Conrad in appellant's home were her's to which she replied "yes." [R. T. 230].

(b) Conrad asked appellant where she had gotten the pills and capsules to which she replied "from a friend, but I am not going to tell you because they might be narcotics." [R. T. 230-231].

(c) Conrad testified that he had studied and was familiar with a board in the Los Angeles City Department (a picture of which was received in evidence, Exhibit L) which had on it pills and capsules the possession of which without a prescription were unlawful. Conrad further testified that he had received training in the detection of dangerous drugs and narcotics [R. T. 227-228].

(d) The capsules found in the bottle in appellant's house were identified on the picture of said board [R. T. 513].

(e) Conrad, based upon his experience felt it was of some significance that the bottle was unlabeled and contained two different pills and capsules [R. T. 235].

(f) Conrad observed marks on Lucero's arms which in his opinion based upon his experience appeared to be hypodermic needle marks made by the illegal use of narcotics [R. T. 238].

(g) Conrad was corroborated by a narcotic expert of the Los Angeles Police Department who also believed that the capsules found in the bottle were the same as the capsules on the board, the possession of which without a prescription was a violation of the law [R. T. 510-513].

2. Determine whether the admissibility of appellant's arrests prior to the subject arrest was proper. This issue was briefed by both appellant and appellees. Failure to decide this issue could result in another appeal on this point.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

BOURKE JONES,
Assistant City Attorney,

WILLIAM B. BURGE,
Deputy City Attorney,
Attorneys for Appellees.

Certificate.

I, William B. Burge, one of the attorneys for the appellees certify that in my judgment the Petition for Rehearing is well founded and it is not interposed for delay.

WILLIAM B. BURGE

In the United States Court of Appeals
for the Ninth Circuit

No. 19,521

Handwritten: 10/20/50
10/20/50

FLOTILL PRODUCTS, INC., a corporation, MRS. MEYER
L. LEWIS, ALBERT S. HEISER, and ARTHUR H. HEIS-
ER, individually and as officers of said corporation,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION OF RESPONDENT FOR REHEARING

JAMES MCL. HENDERSON

General Counsel

J. B. TRULY

Assistant General Counsel

E. K. ELKINS

GERALD J. THAIN

Attorneys

Attorneys for the Federal Trade Commission

**In the United States Court of Appeals
for the Ninth Circuit**

No. 19,521

**FLOTILL PRODUCTS, INC., a corporation, MRS. MEYER
L. LEWIS, ALBERT S. HEISER, and ARTHUR H. HEIS-
ER, individually and as officers of said corporation,
PETITIONERS**

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION OF RESPONDENT FOR REHEARING

**To: Hon. Stanley N. Barnes, Circuit Judge
Hon. Frederick G. Hamley, Circuit Judge
Hon. William C. Mathes, Senior District Judge**

Comes now respondent, the Federal Trade Commis-
sion, and, pursuant to the Court's Rule 23, petitions
for rehearing of so much of the decision of this Court,
issued March 16, 1966, as holds that the Commission
lacks authority to issue a valid cease and desist order
without the concurrence of a majority of its members.
It is respectfully suggested that a rehearing *en banc*
of this question is appropriate for the reasons set
forth below.

1. Subsequent to this Court's decision, the Supreme Court, in *Federal Trade Commission v. Borden Company*, — U.S. —, No. 106, decided March 23, 1966, affirmed certain Commission action taken by a vote of two of the three Commissioners who participated in the decision under review. While the particular question was not argued in that case, the fact that only two Commissioners had voted for the action under review was called to the attention of the Supreme Court and the Court of Appeals in the briefs therein, and had been specifically noted in the decision of the Court of Appeals for the Fifth Circuit, *Borden Company v. Federal Trade Commission*, 339 F.2d 133 (1964).

2. The instant decision, by a divided panel of this Court, is in conflict with the decisions of the other Courts of Appeals which have ruled on the question. In the most recent of these decisions, *Atlantic Refining Co. v. Federal Trade Commission*, 344 F.2d 599 (6th Cir. 1965), *cert. denied*, 382 U.S. 939, the Supreme Court refused to grant a petition for certiorari which urged as grounds therefor a ruling contrary to that of this Court.¹

3. The decision will not only lay open to question the validity of a number of pending cases of the Fed-

¹ On April 1, 1966, the petitioner in *Purolator Products, Inc. v. Federal Trade Commission*, 352 F.2d 874 (7th Cir. 1965), Sup. Ct. No. 928, filed in the Supreme Court a motion to amend a petition for certiorari seeking reversal of a judicial affirmance of a Commission order issued by a 2 to 1 vote. The motion cited this Court's opinion in the instant case as the sole authority for its position that Commission action taken by such a vote is invalid.

eral Trade Commission," but may subject to attack actions of other administrative agencies, which, like the Federal Trade Commission, have no specific statute governing the minimum number of members required to take agency action and so have adhered to the common law rule that a majority of a quorum is sufficient. These agencies include the Atomic Energy Commission (42 U.S.C. 2031, *et seq.*), the Federal Power Commission (16 U.S.C. 792, *et seq.*), the Civil Aeronautics Board (49 U.S.C. 1321, *et seq.*), the Securities and Exchange Commission (15 U.S.C. 78d, *et seq.*), and the United States Tariff Commission (19 U.S.C. 1330, *et seq.*). A number of these agencies have expressed concern to respondent about the possible impact of this decision upon their activities.

4. The rule set forth by this Court would prevent the Commission and other administrative agencies from taking action in the not infrequent instances when vacancies or disqualifications result in three of five Commissioners hearing a case, and the three are

² The importance of this question to the Commission is shown by the fact that it has been raised, in addition to the aforementioned *Purolator* case, in *Forster Mfg. Co., Inc. v. Federal Trade Commission* (1st Cir. No. 6625), argued April 5, 1966, awaiting decision, in *Luria Bros. & Co. v. Federal Trade Commission* (3d Cir. No. 14,402 and 11 separate related petitions), argued January 21, 1966, awaiting decision, and in *Lapeyre v. Federal Trade Commission* (5th Cir. No. 21,787), oral argument scheduled for April 19, 1966. And the question recently has been raised in this Court in a pending case, *Continental Baking Co. v. Federal Trade Commission* (9th Cir. No. 19,325), argued February 11, 1966, wherein the Commission affirmed by a 2 to 1 vote rulings decided by a 3 to 1 vote prior to a remand to the examiner.

unable to render a unanimous decision. In such cases, a single Commissioner may veto the desires of the majority of a quorum.

5. The decision may well cause confusion as to when an administrative agency should hear cases since, under it, three members of a five-member agency may hear cases and render decisions if the three participating members are in agreement, but cannot act if they are divided in opinion. An agency will not know whether it can take effective action until it is known how the individual members of the quorum will cast their votes. Agencies undoubtedly will be reluctant to have three members hear cases which may have to be reheard by a larger number of Commissioners if and when such a larger number can be gathered.

6. The majority opinion indicates that "the reasonable construction" of the Commission's rule that a majority of its members constitutes a quorum (16 C.F.R. § 1.7) would be that a majority of a quorum is sufficient to render a decision (slip op., p. 6), but then holds that this regulation is not within the power of the Commission to adopt, because it extends beyond the power conferred by Congress upon the Commission. It is submitted that this holding fails to note the power granted the Commission by Congress in Section 6(g) of the Federal Trade Commission Act (38 Stat. 722; 15 U.S.C. § 46(g)), which authorizes the Commission "to make rules and regulations for the purposes of carrying out the provisions of this Act."

Therefore, respondent suggests that the question is appropriate for a rehearing *en banc* by this Court.

Respectfully submitted.

JAMES MCI. HENDERSON
General Counsel

J. B. TRULY
Assistant General Counsel

E. K. ELKINS
Attorney

GERALD J. THAIN
Attorney

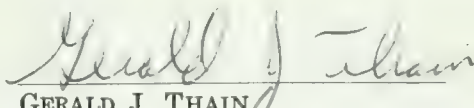
Attorneys for the Federal Trade Commission

APRIL 1966

Washington, D.C.

CERTIFICATE OF COUNSEL

I hereby certify that in connection with the preparation of this petition for rehearing, I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit, that this petition is not interposed for delay, and that, in my judgment, this petition is well founded.


GERALD J. THAIN
*Attorney for the Federal Trade
Commission*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN MAXINE LEVI TRAVIS,

Appellant and Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING
BY APPELLANT

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

A. L. WIRIN
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3175 West Sixth Street
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Attorneys for Appellant

WILLIAM B. MURRISH,
Of Counsel

FILED

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN MAXINE LEVI TRAVIS,

Appellant and Petitioner,

vs.

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PETITION FOR REHEARING
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELEN MAXINE LEVI TRAVIS,

Appellant and Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING
BY APPELLANT

To The Honorable United States Court of Appeals for the Ninth
Circuit, and To The Honorable Stanley N. Barnes, M.
Oliver Koelsch and Charles L. Powell, Judges Sitting in
the Instant Cause:

Appellant Helen Maxine Levi Travis respectfully petitions
the Court to grant a rehearing in the within cause from the judgment
on appeal rendered and filed on November 19, 1962, upon the
grounds and for all of the considerations stated below:

(1) In disallowing Appellant's contention that the Exclud-
ing Cuba regulation was by its express promulgation clause
promulgated only under Section 211a (22 U. S. C. Sec. 211a, Act

of July 3, 1926), a statute which does not impose criminal penalty for violation of regulations issued under its authority, and not under Section 1185 (8 U. S. C. Sec. 1185), a statute which does impose criminal penalty for violation of regulations issued under its authority, the Court observed only,

"The 'Excluding Cuba' regulation is an amendment and as originally promulgated 22 CFR 53.1-53.9 made specific reference to 8 U. S. C. Sec. 1185."
(Slip Op., 3, emphasis added.)

But the circumstance that the original regulations of 22 CFR 53.1-53.9 were issued and promulgated under the authority and with the criminal sanction of Section 1185 ^{1/} does not reach, affect or cure the circumstance that the Excluding Cuba amendment was not issued under such authority but only under authority of Section 211a, carrying no power of criminal sanction.

The issue is important and narrow and is a question of authorizing power. The authority of administrative officers to enact regulations with the force of criminal sanctions must be grounded in an authorizing statute; it is an awesome power and is strictly circumscribed. Accordingly, even to amend originally criminal regulations so that the amendment or change will also bear criminal

^{1/} Actually they were issued under the predecessor statutes of Section 1185, the Act of May 22, 1918, 40 Stat. 559, as amended by the Act of June 21, 1941, 55 Stat. 252, as was expressly recited in their promulgation clause, 6 Fed. Reg. 6069. See Appellant's Opening Brief, pp. 33-34. They were adopted under Section 1185 by incorporation by reference in Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, par. 1.

force, the amendment must itself be duly issued under the authorization and authority of a statute providing criminal penalty for violation of regulations issued under it. Section 211a, under the authority of which alone the Excluding Cuba regulation was expressly issued, possesses and transmits no such authorizing power. Hence violation of that regulation can be no crime.

(2) In disallowing Appellant's void for vagueness contentions the Court's opinion (Slip Op., p. 3) states,

"A reading of the statute and the regulations demonstrates the plain and unambiguous meaning to be that a person is subject to criminal penalties on leaving the United States for Cuba without a valid passport. That Appellant knew this is agreed in the stipulation." (Emphasis added.)

But the stipulation was only that Appellant "knew the provisions of Section 1185(b) of Title 8, United States Code, and Sections 53.2 and 53.3 of Title 22, Code of Federal Regulations." (Transcript of Record, p. 65, lines 24-26.) This does not stipulate to the meaning or effect of the statute or regulation now claimed by the Court, and the suggestion of "stipulation" as to statutory and regulatory meaning and effect has obscured and left unconsidered the serious claim by Appellant that the command of the statute and regulation is void for vagueness and contradiction.

All of the prior restrictions issued by the Department sounded only in a civil safe-passage-withdrawal terms and were issued

under the authority of Section 211a bearing no criminal sanction, and respecting such restrictions the Department repeatedly disclaimed that they imposed prohibition on travel under criminal law. These facts tell the citizen that travel to the proscribed areas is not regarded as a crime. To prosecute thereafter turns this contrived structure of administrative regulations into a trap even for the wary. Considering the foregoing facts in light of the legislative history of Section 1185 indicating no suggestion of intent to authorize criminal-sanction area travel bans and the repeated unsuccessful recent attempts by the Executive since Section 1185 to obtain from Congress a statutory amendment authorizing criminal area limitations, and considering, finally, the climaxing circumstance that the Excluding Cuba regulation was expressly promulgated under Section 211a (bearing no criminal sanction) and not under Section 1185, with criminal penalties, it appears difficult to deny that Appellant, or any other citizen, might reasonably read the Excluding Cuba regulation in the light of all of these circumstances as communicating no criminal-sanction area travel prohibition. (Appellant's Supplemental Brief, pp.12-15.) Petitioner was misled. She did not reach the wrong interpretation of the regulatory maze. Rather the Government reversed its field by professing to impose no criminal sanctions and after reliance thereon doing the very opposite.

Appellant respectfully urges the Constitutional fundamental that a statute or regulation bearing criminal sanction may not be vague, contradictory or misleading in its command. Commands so characterized are void for want of due process. (Raley v. Ohio,

360 U. S. 423, 438; Johnson v. United States, 318 U. S. 189, 197; Cox v. Louisiana, ____ U. S. ____, 13 L. Ed. 2d 487, 496; United States v. Cardiff, 344 U. S. 174, 176.) A citizen may not be convicted of crime until he is made to know by Government that his act is criminally prohibited; without such awareness his state of mind lacks punishable scienter. (Morissette v. United States, 342 U. S. 246; Lambert v. California, 355 U. S. 225; Smith v. California, 361 U. S. 147, 150-151.) "Elementary fairness" requires that a defendant "be not misled", but be "clearly apprised" by the law of any criminal command. (Johnson v. United States, supra, 318 U. S. 189, 197; Quinn v. United States, 349 U. S. 155, 166.)

WHEREFORE, upon all of the reasons and considerations above stated Appellant respectfully prays that a rehearing be allowed in the within cause.

Respectfully submitted,

A. L. WIRIN

JOHN T. McTERNAN

By /s/ John T. McTernan

JOHN T. McTERNAN

WILLIAM B. MURRISH
Of Counsel

Attorneys for Appellant and
Petitioner

CERTIFICATE

I certify that in my judgment the foregoing Petition for Rehearing is well founded and is not interposed for delay.

I further certify that, in connection with the preparation of said Petition, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the said foregoing Petition is in full compliance with those rules.

/s/ John T. McTernan
JOHN T. McTERNAN

No. 19,644

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

SEABOARD SURETY Co., a corporate entity, etc., *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA for the Use and Benefit
of C. D. G., INC., a corporate entity,
Appellee.

PETITION FOR REHEARING.

WILLIAM E. FITZPATRICK and
PETER A. LEWI,

1801 Avenue of the Stars,
Los Angeles, Calif. 90067,

Attorneys for Appellants.

No. 19,644

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SEABOARD SURETY Co., a corporate entity, etc., *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA for the Use and Benefit
of C. D. G., INC., a corporate entity,

Appellee.

PETITION FOR REHEARING.

*To the Honorable Oliver D. Hamley, Circuit Judge,
Gilbert Jertberg, Circuit Judge, and William Jame-
son, District Judge:*

Appellants hereby petition for a rehearing to reconsider the judgment entered in this action on January 17, 1966, on the following ground:

The method used by the trial court and approved by this court to compute the amount of the judgment does not conform to the standard of recovery set forth in the rule of law adopted by the Court.

In its decision this Court makes a distinction between two different measures of recovery depending upon whether or not the subcontractor has competed performance. Citing *B. C. Richter Contracting Co. v. Continental Casualty Co.*, 1964, 230 A.C.A. 540, 41 Cal. Rptr. 98, the Court stated that when confronted by a breach by the prime contractor, the subcontractor elects

to complete performance, the measure of recovery is "*the unpaid balance of the contract price plus extra costs caused by hindrances and delays.*" (p. 6). The Court further held that where, as was found in this case, the subcontractor is prevented from completing performance by a wrongful termination he has the option to forego a suit for damages on the contract and may claim "*the reasonable value of his performance.*" (p. 7). The Court later cited portions of the District Court's memorandum opinion, which would indicate that the District Court adopted and applied the latter measure of recovery (p. 10). The Court also incorporated the District Court's computation of the amount of recovery (p. 4). (See attached Exhibit A).

It is respectfully submitted that the basic error in this case is that there is no evidence to support the computation and furthermore the computation does not support recovery under either of the foregoing theories.

Assuming that the finding as to the total amount spent by plaintiff on the project (\$187,223.19) is correct, there remain two essential elements of the computation which lack supporting evidence. First there is the item designated "Cost of Work Performed under the Contract," \$97,000.00. There was no evidence whatever of the cost of the work performed under the contract as distinguished from total cost. The figure of \$97,000.00 is the *contract price* for the completed work. Secondly, the item designated "Cost of the Excessive Work" at \$67,667.39 is unsupported by any evidence. An analysis of the derivation of this figure shows that the Court started with the total cost of \$187,223.19 and first subtracted the "Cost of Work Performed Under the Contract" (\$97,000.00) which as stated above was simply not proved. The remainder (\$90,223.19) is designated "excessive cost." There is no evidence in the record of the actual cost of extra work, nor evidence of

its quantity or quality. The 75%/25% allocation of fault does not correct the error because the Court applied these percentages to a figure which was never proved: *i.e.*, the artificially determined “excessive cost” figure.

Appellants do not contend that it would be improper for a Court to take the available evidence and by logic and arithmetic arrive at a figure which fairly represents *reasonable value*. Appellants do contend, however, that the computation here is illogical because of the confusion of the concepts of *cost* and *price* and further that there was no evidence regarding the allocation of actual costs as between work under the contract and extra work. Seemingly the only function of the deduction of the contract price from the cost was to reduce the figure to which plaintiff’s 25% inefficiency was to be applied, and there was certainly no evidence that plaintiff was inefficient only as to the work outside the contract.

Although the decision purports to be based upon *reasonable value* the computation was made in terms of *unpaid balance of contract price plus extra costs caused by hindrance and delay*. The computation does not support recovery under the latter theory either, however, because of the aforementioned lack of proof of the allocation of costs. This lack of evidence should be viewed in the context of a decision where the amount awarded for extra work (\$67,667.39) is approximately 38% of the total amount found to have been due appellee (\$178,167.39) and approximately 60% of the amount of the judgment (\$112,338.39). The judgment is more than three times the amount the Court found due as the balance of the Contract.

The confusion as to which theory of recovery was actually applied here is illustrated by this Court’s discussion of pre-judgment interest. The court states that

the \$97,000.00 representing cost of work performed under the contract was ascertainable by calculation whereas the \$65,667.39 due for extra work was not (p. 11). If this is in fact a pure reasonable value case then it would seem that the \$97,000.00 can be at most evidence of the reasonable value of work under the contract and the entire judgment was ascertainable only by judicial determination and there should be no prejudgment interest awarded.

Appellants urge that the evidentiary problem in this case involves a basic question of law which has important and far-reaching policy implications.

That basic question of law is:

In a claim by a subcontractor under a Miller Act or Capehart Act bond, what is the standard for proving the reasonable value of the work performed?

Appellants have been unable to locate any case which adequately answers this question and it is felt that this case presents the question in its purest form.

Prime contractors, subcontractors and sureties all need an answer to the question posed herein. If it is the law that a subcontractor need merely prove the actual costs incurred without isolating costs under the contract and costs for extra work, then the law should be so stated in order that the parties, particularly sureties, may adjust their business dealings accordingly.

WILLIAM E. FITZPATRICK and
PETER A. LEWI,

By WILLIAM E. FITZPATRICK,
Attorneys for Appellants.

Certificate.

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

Dated: February 15, 1966.

WILLIAM E. FITZPATRICK

EXHIBIT "A".

"COST OF COMPLETED UNITS

at contract price:

98 units at \$875	\$ 85,750.00
-------------------	--------------

COST OF UNCOMPLETED UNITS:

22 units at contract price of \$875	\$ 19,250.00
Less cost of completion	8,000.00 ⁸
	11,250.00

COST OF WORK PERFORMED UNDER THE CONTRACT

\$ 97,000.00

COST OF THE EXCESSIVE WORK necessitated by the de- fendant Desert Builders' failure to supply materials when required

67,667.39

Total cost of project	\$187,223.19
-----------------------	--------------

Cost of work performed under the contract	97,000.00
---	-----------

Excessive cost	\$ 90,223.19
----------------	--------------

Defendant's share of excessive cost	75%
-------------------------------------	-----

	\$ 67,667.39
--	--------------

Deposited in trust account	15,000.00
----------------------------	-----------

Less Trustee's fee	1,500.00
	13,500.00

TOTAL AMOUNT DUE PLAINTIFF

\$178,167.39

Received by plaintiff

65,829.00

TOTAL AMOUNT NOW DUE PLAINTIFF

\$112,338.39

Plaintiff shall be entitled to recover interest thereon from July 24, 1961, and its costs."

No. 19646

United States
COURT OF APPEALS

for the Ninth Circuit

JOHN MILTON PHILLIPS, JR.,
JACK CECIL CHERBO and
RICHARD DALE WALKER,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

**APPELLANT WALKER'S REPLY TO APPELLEE'S
PETITION FOR A REHEARING**

*Appeal from the United States District Court
for the District of Oregon*

HONORABLE JOHN F. KILKENNY, Judge

E. F. BERNARD,
WILLIAM E. HURLEY,
BERNARD, BERNARD & HURLEY,
Standard Plaza, Portland, Oregon,
Attorneys for Appellant Richard Dale Walker.

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN MILTON PHILLIPS, JR.,
JACK CECIL CHERBO and
RICHARD DALE WALKER,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

**APPELLANT WALKER'S REPLY TO APPELLEE'S
PETITION FOR A REHEARING**

*Appeal from the United States District Court
for the District of Oregon*

HONORABLE JOHN F. KILKENNY, Judge

**APPELLANT WALKER'S REPLY TO APPELLEE'S
PETITION FOR A REHEARING**

1. There is nothing in the record to substantiate the government's contention that the defendant Cherbo by his own testimony had notice that "... the advertising

of the venture was being misunderstood . . .” He had seen some letters wherein purchasers had cancelled, but there is nothing to show that these were not from purchasers who had just changed their minds, felt they couldn’t afford it, or made other investments, etc. It cannot be said that Ex. 968 and 984 were cumulative since there is no evidence as to the type of documents he had seen before. A mere reading of 968-82 shows that it is anything but harmless. Finally, if the government’s position were one hundred per cent correct instead of one hundred per cent wrong, it would have no effect upon the reversal of the defendant Walker’s conviction. The exhibits could hardly be said to be merely cumulative as to him, as there is no evidence he had ever seen or heard of any documents even remotely resembling these exhibits, which were erroneously received as to him.

2. The government claimed for the first time on appeal that the exhibits were relevant and admissible not to show knowledge and notice to these defendants, but allegedly as evidence of overt acts, i.e. the receipt and handling of correspondence, by persons claimed to be co-conspirators. The fact is, the evidence was offered at trial for *one purpose only*, i.e. in an effort to show knowledge of these appellants, and no other. The jury was instructed that the exhibits were to be used for one purpose, determining knowledge and no other. (The vice of that instruction was that the jury was not told that substantial evidence of actual knowledge would be required.) The government’s so-called alternative ground

for admission referred to in its brief at page 65, did not merit any treatment in the opinion.

3. Appellee's fear that the decision has eviscerated the offense of conspiracy is groundless. The opinion of the court has not altered, by so much as one iota, the law of conspiracy. The ruling of this court has not modified the rule that the act of one conspirator is chargeable to another. That principle was never in issue. The government has apparently never grasped the problem. First you start with certain documents (968 and 984) which in and of themselves cannot be offered to prove the truth of matters contained therein. We know that in certain circumstances they can be offered to show the actions, if any, or inactivity after one has knowledge of them. In other words, to make them admissible the defendants had to know of them. In this case the government was attempting to show that these appellants knew of them because others, allegedly co-conspirators, knew of them. It was this attempt the court quite properly thwarted. The case of *Ingram v. U. S.*, 360 U.S. 672 (1958) compelled such a result. Further, it is not true that these appellants are in the position of Ingram and Jenkins. Ingram and Jenkins were the ones with knowledge. Smith and Law did not have knowledge. The appellants did not have knowledge. Knowledge could not be constructively imputed to Smith and Law, and it could not be imputed to these defendants.

4. The court's opinion does not detract in the slightest from the authority of *Mathes and Devitt Federal Jury Instructions, Civil and Criminal*. Those instructions upon conspiracy, relating to the acts of one con-

spirator being charged to another, are still accurate and conform to the law. There are no instructions to be found therein regarding the use to which a jury could put the type of documents involved in this case.

5. The appellants were in fact, not "in charge" of the files of any corporation. This was recognized by the court (Tr. Vol. III, p. 361). They lived thousands of miles from the files in question. The case of *Edwards v. U. S.*, 334 F.2d 361 (5th Cir., 1964) turned upon the fact that a rebuttal presumption existed (knowledge of the law), which shifted the burden of going forward. Had this appellant been advised *at trial* that some new presumption was being created, in addition to excepting to such a determination, he could have gone forward to prove his lack of knowledge.

It would appear that the court has not been presented with any substantial reason for granting a rehearing.

Respectfully submitted,

E. F. BERNARD

WILLIAM E. HURLEY

BERNARD, BERNARD & HURLEY

Attorneys for Appellant

Richard Dale Walker

CERTIFICATE OF COUNSEL

I certify that, in connection with the presentation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM E. HURLEY

**Of Attorneys for Appellant
Richard Dale Walker**

No. 19673 ✓

*Admitted
J. 3352*

United States
COURT OF APPEALS
for the Ninth Circuit

SIMPSON TIMBER CO. and
GRACE LINE, INC.,

Appellants,

v.

EZRA PARKS,

Appellee.

SIMPSON TIMBER CO.,

Appellant,

v.

GRACE LINE, INC., and
BRADY-HAMILTON STEVEDORE CO.

Appellees.

PETITION FOR REHEARING OF APPELLEE
BRADY-HAMILTON STEVEDORE CO.

Appeal from the United States District Court
For the District of Oregon

GRAY, FREDRICKSON & HEATH,
NATHAN J. HEATH,

421 S. W. Sixth Avenue, Portland, Oregon 97204,
Attorneys for Brady-Hamilton Stevedore Co.

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No. 19673

United States
COURT OF APPEALS
for the Ninth Circuit

SIMPSON TIMBER CO. and
GRACE LINE, INC.,

Appellants,

v.

EZRA PARKS,

Appellee.

SIMPSON TIMBER CO.,

Appellant,

v.

GRACE LINE, INC., and
BRADY-HAMILTON STEVEDORE CO.

Appellees.

PETITION FOR REHEARING OF APPELLEE
BRADY-HAMILTON STEVEDORE CO.

Appeal from the United States District Court
For the District of Oregon

PETITION FOR REHEARING OF APPELLEE
BRADY-HAMILTON STEVEDORE CO.

Appellee Brady-Hamilton Stevedore Co. petitions
the Court for rehearing upon the ground the Court

erred in reversing the decree in its favor on the indemnity claim of Simpson Timber Co.

The opinion of the majority states (Op. 10) that the district judge's conclusions were derived in part from accepting the jury's factual determinations. With respect to Brady-Hamilton the trial judge said (R. 143) (1) Simpson was an "utter stranger" to stevedore, and (2) stevedore had no knowledge or opportunity to learn of the latent condition. The Findings of Fact and Conclusions of Law were consistent (R. 165, 166). These determinations had nothing whatsoever to do with any conclusions reached by the jury. They fully supported the judgment in favor of Brady-Hamilton.

The trial judge's determination was clearly based on substantial evidence. This Court has not suggested that such determination was clearly erroneous. *McAllister v. United States*, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20 (1954).

The judgment in favor of Appellee Brady-Hamilton Stevedore Co. should be re-instated.

Respectfully submitted,

GRAY, FREDRICKSON & HEATH
NATHAN J. HEATH
Attorneys for Appellee
Brady-Hamilton Stevedore Co.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this petition, I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing petition is in full compliance with that rule. I further certify that this petition is in my judgment well founded and is not interposed for delay.

NATHAN J. HEATH

**Of Attorneys for Petitioner
Brady-Hamilton Stevedore Co.**

No. 19673

United States
COURT OF APPEALS
for the Ninth Circuit

SIMPSON TIMBER CO. and
GRACE LINE, INC.,

Appellants,

v.

EZRA PARKS,

Appellee.

SIMPSON TIMBER CO.,

Appellant,

v.

GRACE LINE, INC., and
BRADY-HAMILTON STEVEDORE CO.

Appellees.

PETITION FOR REHEARING OF APPELLEE EZRA PARKS

*Appeal from the United States District Court
For the District of Oregon*

POZZI, LEVIN & WILSON,
PHILIP A. LEVIN,
808 Standard Plaza, Portland, Oregon 97204,
Attorneys for Ezra Parks.

No. 19673

United States
COURT OF APPEALS
for the Ninth Circuit

SIMPSON TIMBER CO. and
GRACE LINE, INC.,

Appellants,

v.

EZRA PARKS,

Appellee.

SIMPSON TIMBER CO.,

Appellant,

v.

GRACE LINE, INC., and
BRADY-HAMILTON STEVEDORE CO.

Appellees.

PETITION FOR REHEARING OF APPELLEE EZRA PARKS

*Appeal from the United States District Court
For the District of Oregon*

Appellee Ezra Parks petitions the Court for a rehearing upon the following grounds:

I. The court erred as to Simpson Timber Company:

A. In stating that the giving of the instruction held to be reversible error was one of Simpson's "main

points" on appeal (Op. 3), when it has never asserted any such point as a main, subsidiary, or any other point, nor has it claimed any other error with respect to the instructions given.

B. In stating that Simpson objected to the instruction (Op. 3), when the only exception taken by Simpson on the issue of liability (Tr. 298-299) raised no such issue.

C. In reversing for the giving of an instruction embodying a principle of law to which Simpson never objected at any time. Simpson did not take exception to the instruction, it did not object to plaintiff's pre-trial contentions (R. 91), and when it moved for a new trial, it made no claim that the court erred in giving any instruction whatever (R. 131-134). Reversal is flatly contrary to the rule of this Court that in civil cases a judgment will not be reversed for alleged error not objected to, even when there is "plain error." *Crespo v. Fireman's Fund Indemnity Co.*, 318 F.2d 174, 175 (C.A. 9, 1963); *Rudick v. Prineville Memorial Hospital*, 319 F.2d 764, 770 (C.A. 9, 1963); Federal Rules of Civil Procedure, Rule 51.

D. In reversing the cause for the giving of a constructive notice instruction in all respects consistent with the instructions requested by Simpson. See Requested Instructions II, III, XII, XVII, XXI and XXII (R. 105, 106, 115, 120, 124, 125). For example, immediately before, and as part of the same instruction for which the Court now reverses, the trial court instructed (Tr. 273):

“Now, specifically in this case, as the manufacturer and the packager of the doors in question, Simpson Timber Company was under a duty to exercise reasonable care to employ such materials and methods in the construction and the packaging of the doors or warning of danger, if any there was, as were appropriate to the use for which it was intended and would render the packaged doors reasonably safe for handling in the course of shipment *as Simpson Timber Company might reasonably be charged with in anticipation of the fact that the goods would flow in commerce.*” (Emphasis supplied.)

With insignificant changes, this was Simpson’s Requested Instruction XXI. The trial judge noted that he was following Simpson’s instructions “almost verbatim” (Tr. 259). See also, paragraph 15 of Simpson’s Motion for New Trial (R. 134) asserting that the court erred in *not* giving an instruction embodying the constructive notice principle for which the Court reverses.

E. In holding that the instruction in question implicitly contained a requirement that Simpson make inquiry, when the instruction made no such requirement, but merely required that Simpson use “reasonable care.”

F. In depriving plaintiff of due process of law and the right to a jury trial as guaranteed by the 5th and 7th Amendments to the United States Constitution in reversing for the giving of an instruction which was neither excepted to nor asserted as error

on appeal; and when plaintiff has never been given an opportunity to be heard with respect to the correctness of the instruction.

II. The court erred as to defendant Grace Line:

A. In reversing as to liability for the giving of an allegedly erroneous instruction when Grace Line raised no issue of liability on appeal, specifically limited its petition for rehearing to damages only, and took no exception to the instructions of the trial court (Tr. 298); and when the instruction in question could not possibly have affected the liability of Grace Line.

B. In reversing for the giving of an instruction which was not excepted to, and when no issue of liability was raised by Grace Line in the court below, contrary to the uniform refusal of this Court to apply a rule of "plain error" in civil cases. *Crespo v. Fireman's Fund Indemnity Co.*, 318 F.2d 174, 175 (C.A. 9, 1963); *Rudick v. Prineville Memorial Hospital*, 319 F.2d 764, 770 (C.A. 9, 1963).

C. In depriving plaintiff of due process of law and the right to a jury trial under the 5th and 7th Amendments to the United States Constitution by reversing a jury verdict as to Grace Line for the giving of an instruction which was not excepted to, which was not asserted as error on appeal, and with respect to which, and its effect, if any, on Grace Line, plaintiff has never been given an opportunity to be heard.

D. In reversing as to liability when the vessel was unseaworthy because, as the Court states, "Used as a floor or walking surface, the bundle of doors was a trap" (Op. 4).

CONCLUSION

The opinion of this Court decides issues which were first raised by the Court itself, after the parties, in briefs, petitions and two arguments, had never asserted them. Plaintiff has never been heard on these issues. It is manifestly unjust to reverse a judgment in favor of plaintiff for the giving of an instruction which was essentially that requested by the defendant as to whom it is held to be error, which did not affect the other defendant, and to which no exception was ever taken or any error asserted on appeal by either defendant.

POZZI, LEVIN & WILSON

PHILIP A. LEVIN

Attorneys for Appellee-Petitioner
Ezra Parks

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this petition, I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing petition is in full compliance with that rule. I further certify that this petition is in my judgment well founded and is not interposed for delay.

PHILIP A. LEVIN
Of Attorneys for Petitioner

No. 19673

United States
COURT OF APPEALS
for the Ninth Circuit

SIMPSON TIMBER CO. and
GRACE LINE, INC.,

Appellants,

v.

EZRA PARKS,

Appellee.

SIMPSON TIMBER CO.,

Appellant,

v.

GRACE LINE, INC., and
BRADY-HAMILTON STEVEDORE CO.

Appellees.

PETITION FOR REHEARING OF APPELLEE EZRA PARKS

*Appeal from the United States District Court
For the District of Oregon*

POZZI, LEVIN & WILSON,
PHILIP A. LEVIN,
808 Standard Plaza, Portland, Oregon 97204,
Attorneys for Ezra Parks.

No. 19673

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B. In stating that Simpson objected to the instruction (Op. 3), when the only exception taken by Simpson on the issue of liability (Tr. 298-299) raised no such issue.

C. In reversing for the giving of an instruction embodying a principle of law to which Simpson never objected at any time. Simpson did not take exception to the instruction, it did not object to plaintiff's pre-trial contentions (R. 91), and when it moved for a new trial, it made no claim that the court erred in giving any instruction whatever (R. 131-134). Reversal is flatly contrary to the rule of this Court that in civil cases a judgment will not be reversed for alleged error not objected to, even when there is "plain error." *Crespo v. Fireman's Fund Indemnity Co.*, 318 F.2d 174, 175 (C.A. 9, 1963); *Rudick v. Prineville Memorial Hospital*, 319 F.2d 764, 770 (C.A. 9, 1963); Federal Rules of Civil Procedure, Rule 51.

D. In reversing the cause for the giving of a constructive notice instruction in all respects consistent with the instructions requested by Simpson. See Requested Instructions II, III, XII, XVII, XXI and XXII (R. 105, 106, 115, 120, 124, 125). For example, immediately before, and as part of the same instruction for which the Court now reverses, the trial court instructed (Tr. 273):

“Now, specifically in this case, as the manufacturer and the packager of the doors in question, Simpson Timber Company was under a duty to exercise reasonable care to employ such materials and methods in the construction and the packaging of the doors or warning of danger, if any there was, as were appropriate to the use for which it was intended and would render the packaged doors reasonably safe for handling in the course of shipment *as Simpson Timber Company might reasonably be charged with in anticipation of the fact that the goods would flow in commerce.*” (Emphasis supplied.)

With insignificant changes, this was Simpson’s Requested Instruction XXI. The trial judge noted that he was following Simpson’s instructions “almost verbatim” (Tr. 259). See also, paragraph 15 of Simpson’s Motion for New Trial (R. 134) asserting that the court erred in *not* giving an instruction embodying the constructive notice principle for which the Court reverses.

E. In holding that the instruction in question implicitly contained a requirement that Simpson make inquiry, when the instruction made no such requirement, but merely required that Simpson use “reasonable care.”

F. In depriving plaintiff of due process of law and the right to a jury trial as guaranteed by the 5th and 7th Amendments to the United States Constitution in reversing for the giving of an instruction which was neither excepted to nor asserted as error

on appeal; and when plaintiff has never been given an opportunity to be heard with respect to the correctness of the instruction.

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A. In reversing as to liability for the giving of an allegedly erroneous instruction when Grace Line raised no issue of liability on appeal, specifically limited its petition for rehearing to damages only, and took no exception to the instructions of the trial court (Tr. 298); and when the instruction in question could not possibly have affected the liability of Grace Line.

B. In reversing for the giving of an instruction which was not excepted to, and when no issue of liability was raised by Grace Line in the court below, contrary to the uniform refusal of this Court to apply a rule of "plain error" in civil cases. *Crespo v. Fireman's Fund Indemnity Co.*, 318 F.2d 174, 175 (C.A. 9, 1963); *Rudick v. Prineville Memorial Hospital*, 319 F.2d 764, 770 (C.A. 9, 1963).

C. In depriving plaintiff of due process of law and the right to a jury trial under the 5th and 7th Amendments to the United States Constitution by reversing a jury verdict as to Grace Line for the giving of an instruction which was not excepted to, which was not asserted as error on appeal, and with respect to which, and its effect, if any, on Grace Line, plaintiff has never been given an opportunity to be heard.

D. In reversing as to liability when the vessel was unseaworthy because, as the Court states, "Used as a floor or walking surface, the bundle of doors was a trap" (Op. 4).

CONCLUSION

The opinion of this Court decides issues which were first raised by the Court itself, after the parties, in briefs, petitions and two arguments, had never asserted them. Plaintiff has never been heard on these issues. It is manifestly unjust to reverse a judgment in favor of plaintiff for the giving of an instruction which was essentially that requested by the defendant as to whom it is held to be error, which did not affect the other defendant, and to which no exception was ever taken or any error asserted on appeal by either defendant.

POZZI, LEVIN & WILSON

PHILIP A. LEVIN

Attorneys for Appellee-Petitioner
Ezra Parks

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this petition, I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing petition is in full compliance with that rule. I further certify that this petition is in my judgment well founded and is not interposed for delay.

PHILIP A. LEVIN
Of Attorneys for Petitioner

No. 19673

United States
COURT OF APPEALS

For the Ninth Circuit

SIMPSON TIMBER CO. and
GRACE LINE, INC.,

Appellants,

v.

EZRA PARKS,

Appellee.

SIMPSON TIMBER CO.,

Appellant,

v.

GRACE LINE, INC. and
BRADY-HAMILTON STEVEDORE CO.,

Appellees.

**GRACE LINE, INC.'S PROTECTIVE PETITION
FOR REHEARING**

*Appeal from the United States District Court
for the District of Oregon*

WOOD, WOOD, TATUM, MOSSER & BROOKE
JOHN R. BROOKE,

1310 Yeon Building, Portland, Oregon 97204
Attorneys for Grace Line, Inc.

United States
COURT OF APPEALS
For the Ninth Circuit

SIMPSON TIMBER CO. and
GRACE LINE, INC.,

Appellants,

v.

EZRA PARKS,

Appellee.

SIMPSON TIMBER CO.,

Appellant,

v.

GRACE LINE, INC. and
BRADY-HAMILTON STEVEDORE CO.,

Appellees.

**GRACE LINE, INC.'S PROTECTIVE PETITION
FOR REHEARING**

*Appeal from the United States District Court
for the District of Oregon*

Appellee Grace Line, Inc. petitions the Court for a rehearing and reinstatement of Grace Line, Inc.'s judgment of indemnity over against appellant Simpson Timber Company in the event the Court grants a rehearing to appellee Ezra Parks and reinstates his judgment.

Grace Line, Inc.'s petition for rehearing and reinstatement is to protect itself as Grace Line, Inc.'s judgment of indemnity over against Simpson Timber Company was reversed by the Court.

If rehearing is granted and Parks' judgment reinstated, Grace Line, Inc.'s judgment against Simpson Timber Company should be reinstated for the following reasons:

1. In deciding the issues of indemnity the trial court found as a fact that:

Simpson "knew or should have known the regular and customary practice of using cargo stowed aboard a vessel as working surface by the men loading or unloading the vessel" (R. 163).

Further on the issue of indemnity, the trial court found as a fact that:

Simpson's negligence was the "primary, efficient, and sole proximate cause of Parks' said accident and resulting injuries" (R. 165).

2. This Court's original decision affirmed the trial court's judgment granting Grace Line indemnity over against Simpson Timber Company as being consistent with prior decisions of the Court, as well as being justified on other grounds. There has been no dissent.

CONCLUSION

Grace Line, Inc.'s judgment of indemnity over against Simpson Timber Company should be reinstated if the Court reinstates Ezra Parks' judgment.

WOOD, WOOD, TATUM, MOSSER & BROOKE
JOHN R. BROOKE
Attorneys for Appellee-Petitioner
Grace Line, Inc.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this petition I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit, and in my opinion the foregoing is in full compliance with that rule. I further certify that this petition is in my judgment well founded and not imposed for delay.

JOHN R. BROOKE
Of Attorneys for Petitioner

No. 19,673

United States
COURT OF APPEALS
for the Ninth Circuit

SIMPSON TIMBER CO. and
GRACE LINE, INC.,

Appellants,

v.

EZRA PARKS,

Appellee.

SIMPSON TIMBER CO.,

Appellant,

v.

GRACE LINE, INC., and
BRADY-HAMILTON STEVEDORE CO.,

Appellees.

PETITION FOR REHEARING

*Appeal From the United States District Court
for the District of Oregon*

MAUTZ, SOUTHER, SPAULDING, KINSEY
& WILLIAMSON,
ROBERT T. MAUTZ,
KENNETH E. ROBERTS,
Attorneys for Simpson Timber Co.

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United States
COURT OF APPEALS
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GRACE LINE, INC.,

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SIMPSON TIMBER CO.,

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BRADY-HAMILTON STEVEDORE CO.,

Appellees.

PETITION FOR REHEARING

*Appeal From the United States District Court
for the District of Oregon*

MAUTZ, SOUTHER, SPAULDING, KINSEY
& WILLIAMSON,
ROBERT T. MAUTZ,
KENNETH E. ROBERTS,
Attorneys for Simpson Timber Co.

TO THE HONORABLE FREDERICK G. HAMLEY,
JAMES R. BROWNING and WALTER ELY, Cir-
cuit Judges, constituting the court in the original hear-
ing:

Simpson Timber Co. respectfully submits that the court has substantially erred in the decision of its majority dated December 3, 1965 and, in doing so, has upheld a judgment which effects a miscarriage of justice and which rests upon a principle hitherto foreign to the law of torts. In view of the far-reaching consequences of the majority opinion, and in view of the greatly increased and extended liability the majority opinion places on a manufacturer, Simpson respectfully suggests that this case be reheard en banc and makes such suggestion in accordance with the provisions of Rule 23 (5) of the Rules of this Court.

**The Majority of the Court Erred in Holding That
the Manufacturer of a Packaged Product Is Liable
for Personal Injuries to a Longshoreman Sustained
While Misusing Its Product.**

The majority holding extends the liability of a manufacturer to new and unreasonable lengths. Moreover, the majority opinion is in direct conflict with the opinion of the Tenth Circuit in *McCready v. United Iron & Steel Co.*, 272 F.2d 700 (C.A. 10, 1959). The manufacturer in *McCready* was in precisely the identical position as *Simpson*. The dissenting opinion of this court (Op. 18-19) fully discusses the applicability of *McCready*. Furthermore, the majority opinion appears to virtually admit its inability to satisfactorily distinguish *McCready* (Op. 6).

The attempt by the majority (Op. 6) to distinguish

Cohagan v. Laclede Steel Co., 317 S.W.2d 452 (Mo. 1958) fails. See Dissent (Op. 19-20).

In addition to the conflict with the Tenth Circuit, the majority opinion is in direct conflict with the substantive law of the State of Oregon. The majority apparently bases its opinion upon a "risk spreading" or "enterprise liability" theory.

The Supreme Court of Oregon has recently specifically refused to adopt the concept of enterprise liability. In *Wights v. Staff Jennings, Inc.*, — Or. —, 81 O.A.S. 187, 193-195, 405 P.2d 624 (1965), the Supreme Court rejected the risk-spreading tenets of enterprise liability.

The majority opinion appears to assert that Simpson knew, or reasonably should have known, that a general practice of using cargo (including doors) as walking surfaces existed in the longshoring industry. *Simpson was not the shipper of the doors*; it merely delivered the doors on order of the purchaser, f.o.b. dock; at that time its contact with the doors terminated. Indeed, the Trial Judge clearly indicated that Simpson had no knowledge of the method longshoremen used in loading vessels. He stated:

"I don't think there is any evidence in this case regarding the actual loading into the ships as far as Simpson is concerned."

The majority opinion points out that "the manufacturer had sold 16,000 to 18,000 doors to overseas shipment annually for years." (Op. 4). While technically true, at most, Simpson sold 800 to 900 *cutout* doors annually and this was the type of door involved in the litigation (See App. Br. 8). Only 2% of the doors manufactured were exported.

Simpson didn't know whether the doors were going to be "containerized" or whether they would be shipped on barges or other ocean-going vessels.

Would this court charge Simpson with liability had the doors been constructed of a thin veneer in place of the opening for the glass? Would this be a trap? Must the manufacturer foresee use of a *quality* product as a walking surface? This is what the majority holds, and its frightening economic and legal implications appear to be obvious.

The majority asserts that Simpson should know that if its doors are to be exported it should package them for that purpose. No mention is made concerning the ability of the ship or the stevedore to inspect the packaging to make sure it is secure and *proper for use as a walking surface*. The evidence clearly indicated that the shipper (not Simpson) shipped the doors pursuant to a tariff (see Simpson Exhibit 34, App. Br. 17), and the tariff itself failed to specify what would constitute proper packaging for export. *If the ship and the stevedore knew that the doors were to be used for a walking surface, shouldn't the tariff indicate that the package should be so constructed so that it could be so used?*

There was no evidence from which the fact-finder could reasonably infer that the non-shipper manufacturer knew, or reasonably should have known, of the onshore custom of utilizing cargo as a walking surface. (See Op. 17-18; compare Op. 3). If the question is one of reasonable foreseeability the liability of the manufacturer is foreclosed by the decisions in *McCready*, *supra*, and *Cohagan*, *supra*. The jury was not free to disbelieve

the manufacturer's testimony and conclude that it knew of the risk (Op. 4), *because there was no evidence for such a "conclusion."* Nor does the false assumption that Simpson was engaged in packaging doors for export (Op. 5 and N8) aid the majority conclusion.

Moreover, the Tenth Circuit decision (1958) of *Parkinson v. California Co.*, 255 F.2d 265, exonerate Simpson from liability. In *Parkinson*, the manufacturers of liquid propane gas were sued for personal injuries suffered by ultimate consumers, resulting from an explosion. The retailer of the gas knew that new steel tanks leased to the consumer would destroy the artificial odor in otherwise odorless propane gas, and the plaintiff contended that there was an additional duty upon the manufacturer, beyond the duty to properly odorize the gas, to warn that the odor would be destroyed if it were placed in new steel containers. Plaintiffs contended that the defendants owed a duty to warn purchasers of the peculiar characteristics of the product and how certain methods of handling it, which might be foreseen, could make the product inherently dangerous. The Tenth Circuit held that the manufacturer of propane gas could not be held liable to a consumer for failure to give such a warning.

Even the United Kingdom has moved away from the extreme position in the *Polemus* case (the unforeseeable result). [1921] All E.R. Rep. 40; [1921] 3 K.B. 560. See *Overseas Tank Ship v. Morts Dock & Engineering Co., Ltd.*, [1961] 1 All Eng. 404, 100 A.L.R. 2d 928 (1961).

The Court Further Erred in Refusing to Reduce the Judgment Rendered for Plaintiff to the Amount of the Prayer in the Complaint.

The dissenting opinion (13-16) completely analyzes the evidence and indicates that the award was gross and excessive. Simpson asserts that to allow the award to stand would be an unconstitutional deprivation of property without due process of law (which includes due notice). See *Parker v. S.I.A.C.*, 81 Or. Adv. Sh. 589, 592 (1965) — Pac. (2) —.

The Court Erred in Giving Judgment in Favor of Grace Line Against Simpson for Indemnity Because Common Law Indemnity Is Not Permissible in Maritime Torts.

The majority decision is in direct conflict with the doctrine established in *Halcyon Lines v. Haenn Ship Sealing and Refitting Corp.*, 342 U.S. 282 (1952). It also appears to be in direct conflict with the decision of Judge W. H. T. Sweigert in *Mickle v. M/V HENRIETTA WILHELM SCHULTE* (U.S. D.C. Cal. 1960), 188 F. Supp. 77.

CONCLUSION

Simpson respectfully submits that a majority of the court erred in holding the manufacturer liable for an unforeseeable misuse of its product, in permitting a recovery in excess of the ad damnum, in permitting indemnity, and in failing to remand for a new trial on the ground of plaintiff's attorney's misconduct.

Respectfully submitted,

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KENNETH E. ROBERTS,
ROBERT T. MAUTZ,

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with that rule and that this petition for rehearing is in my judgment well founded and is not interposed for delay.

KENNETH E. ROBERTS

Nos. 19674-19680

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 19674

JOHN G. MOFFATT,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19675

MARY E. MOFFATT,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19676

JOHN G. MOFFATT and MARY E. MOFFATT,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

No. 19677

FRANK E. NICHOL,

Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

(Continued on Inside Cover.)

PETITIONERS' PETITION FOR REHEARING.

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No. 19678
RUTH H. NICHOL, *Petitioner on Review,*
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent on Review.*

No. 19679
FRANK E. NICHOL and RUTH H. NICHOL, *Petitioners on Review,*
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PETITIONERS' PETITION FOR REHEARING.

The petitioners, pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit, respectfully request a rehearing of the decision of this Court entered on May 31, 1966, on the following grounds:

1. The Decision Erroneously Concludes That the Liquidation of Moffatt and Nichol, Inc. Was Pursuant to a Plan of Reorganization.

a. This Court's conclusion (Op. 4) that the so-called Howard plan was adopted by Inc.'s management is without support in the record. Significantly, the Tax Court did not include in its Findings of Fact any finding that anyone had communicated the "Howard plan" to any member of the management of either Inc. or Engineers. As was correctly pointed out in the dissenting opinion (Op. 10, fn. 1, at p. 12):

"* * * The record does not disclose that the contents of the memorandum were communicated to the principals or anyone other than Mr. Kennedy. To the contrary, there is testimony that the contents of the memorandum were not communicated to the principals of Inc. or Engineers by anyone. The record does not disclose any action by the Board of Directors of either Inc. or Engineers upon the contents of the memorandum. * * *"

Not only is there no evidence that, prior to December, 1958, the management planned or even contemplated the liquidation of Inc., but the testimony of the officers was also clearly to the contrary. Furthermore, Howard, the author of the "plan," testified, without contradiction, that, upon learning that Inc. had acquired land and was proceeding with plans to construct a building thereon, he advised Kennedy that he felt Inc. should continue and that its liquidation was out of the question.

b. This Court's decision (Op. 6) that the Tax Court correctly concluded that the individual steps taken, beginning with the formation of Engineers and ending with the liquidation of Inc., were interrelated parts of an integrated plan of reorganization adopted in 1957

was manifestly in error. The patent facts—the insistence of Bobisch upon the creation of the new company, the continued business activities of Inc., its substantial investments in land and in building plans, the unforeseen deterioration of business conditions, the heavy losses sustained by the new company, and the fortuitous passage by Congress in August, 1958, of Sections 1371-1377 of the Technical Amendments Act of 1958, all of which occurred over a period of eighteen months—can rationally lead to no other conclusion but that these factors, and not the uncommunicated “Howard plan,” caused the formation of Engineers in July, 1957, and the subsequent, unrelated liquidation of Inc. in December, 1958. It is abundantly clear from the undisputed testimony that the formation of Engineers and the liquidation of Inc., which was not even contemplated in 1957 and which was the result of unexpected developments late in 1958, were not parts of any plan of reorganization.

2. This Court’s Reliance Upon Revenue Ruling 57-518 Was Misplaced, for, Rather Than Supporting the Respondent’s Case, That Ruling Compels a Holding for the Petitioners.

The only authority which this Court cited in holding for the Respondent was Rev. Rul. 57-518, 1957-2 C.B. 253 (Op. 8-9). That Ruling held that where a corporation transfers 70 percent of its assets, such a transfer constitutes “substantially all” of the properties if the properties retained are approximately equal in value to the amount of the liabilities. In so holding, the Commissioner not only withdrew his previous nonacquiescence in the case of *Milton Smith, et al. v. Commissioner*, 34 B.T.A. 702, but also relied solely upon that case as the authority for the Ruling.

In the *Smith* case, after favorably citing several cases which had held that transfers of 80 percent or less of the properties were not transfers of “substantially all” of the properties, the Court said (p. 706):

“* * * All of these cases are distinguishable from the one before us. *In each of them there was retained a substantial amount of assets in proportion*

*to the assets transferred and in none was the retention for the sole purpose of liquidating liabilities. In this case, as above pointed out, assets having a book value, in round figures, of \$133,000 were transferred for stock worth \$170,000; assets worth \$52,000 (including the doubtful real estate) were retained for the purpose of meeting liabilities of \$46,000. After discharging its liabilities—and this was done within the year—the outside figure of assets remaining with the petitioner would be \$6,000, which is certainly not an excessive margin to allow for the collection of receivables with which to meet its liabilities. No assets were retained for the purpose of engaging in any business or for distribution to stockholders. In these circumstances, we are of the opinion that the assets worth \$133,374.08 transferred to the Shaver Co. constituted “substantially all” the assets of the Smith Co. within the meaning of that statutory phrase and the transaction is non-taxable under section 112 (i)(1)(A). * * * [Emphasis added.]*

In relying on the *Smith* case, the Commissioner said in Rev. Rule 57-518 (p. 254):

“The instant case, of the assets not transferred to the corporation, no portion was retained by M corporation for its own continued use inasmuch as the plan of reorganization contemplated M’s liquidation. Furthermore, the assets retained were for the purpose of meeting liabilities, and these assets at fair market values, approximately equalled the amount of such liabilities. Thus, the facts of this case meet the requirements established in the case of Milton Smith, supra.” [Emphasis added.]

Rev. Rul. 57-518 also specifically reaffirmed that portion of I.T. 2373, VI-2 C.B. 19, which held that where a corporation transferred its manufacturing plant, consisting of land, buildings and equipment, and which approximated 75 percent of its assets, and retained only about 25 percent of its assets, consisting mostly of accounts receivable and a contract right to receive stock, that corporation had *not* transferred “substantially all” its assets.

Thus, both the *Smith* case and Rev. Rul. 57-518 hold that, where the circumstances are that the transferor corporation retains assets approximately equal to its liabilities and not for distribution to shareholders, a transfer of 70 percent of the assets will qualify as "substantially all." However, it is equally clear from reading those same authorities and I.T. 2372 that a transfer of 75 percent or less will not be "substantially all" if the retained assets are not approximately equal to the liabilities and are retained for distribution to the shareholders. In the instant case, the shareholders of Inc. unquestionably received and retained at least 35 percent of the *net* assets; thus, under the authority of Rev. Rul. 57-518, I.T. 2372, and the *Smith* case there could not have been a transfer of "substantially all" the assets to Engineers under these circumstances.

3. The Decision Is Contrary to Express Statutory Provisions.

This Court has previously held in *Pillar Rock Paving Co. v. Commissioner*, 90 F. 2d 949 (C.A. 9th), that a transfer of only 68 percent of the total assets was not a "transfer of substantially all the properties." See also: *Arctic Ice Machine Co. v. Commissioner*, 23 B.T.A. 1223; *C. I. Inv. Co. v. Commissioner*, 88 F. 2d 582 (C.A. 8th). In *Pillar Rock*, this Court said:

"Petitioner contends that substantially all its 'properties' means substantially all its physical 'operating' properties. We believe no such limitation can be placed on the word 'properties'. The word must be taken in its ordinary sense, and as it is a comprehensive word it includes accounts receivable. If Congress had intended to restrict the meaning of the word, it would have done so."

The distinction of *Pillar Rock* in the decision herein (Op. 8, fn. 1 at p. 9) was clearly without substance, for, contrary to this Court's inference, a statute is subject to only one interpretation regardless of which party is seeking to come under or escape it. *Healy v. Commissioner*, 345 U.S. 278, 284-285. This axiom is no less true in cases involving the reorganization sections

which Congress necessarily meant to be similarly binding on both the taxpayers and the Commissioner. Likewise, while the words "capital gain" and "capital asset" are words of art subject to strict construction (with respect to all parties) ordinary words used in the revenue laws must be given their ordinary meanings even in those cases where such a construction results in allowance of capital gains to the taxpayer. *Commissioner v. Brown*, 380 U.S. 563, 570-571; *Malat v. United States*, 34 U.S.L. Week 4267 (U.S. Sup. Ct., March 21, 1966). See also: *Hanover Bank v. Commissioner*, 309 U.S. 672, 687.

Therefore, it was error for this Court to hold in the instant case that a transfer of, at most, 65 percent of the total assets was a transfer of "substantially all the assets", for this conclusion was contrary to the plain, ordinary meaning of those words in the statute. *Pillar Rock Packing Co. v. Commissioner, supra*.

It is therefore respectfully submitted that this petition for rehearing should be granted, and that, upon such rehearing, this Court's decision should be vacated and the judgment appealed from reversed; or, in the alternative, that upon the grant of rehearing, the case be set down for further hearing *en banc*.

Respectfully submitted,

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I am one of counsel for petitioners herein and I certify that in my judgment this petition is well founded and it is not interposed for delay.

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